Supreme Court, U.S.
FILED

03 804 DEC 1 2003

No. 03-___

IN THE

Supreme Court of the United States

COYOTE VALLEY BAND OF POMO INDIANS,
Petitioner,

v.

THE STATE OF CALIFORNIA.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

RODNEY R. PATULA
(Counsel of Record)
EDUARDO G. ROY
AMY E. ROSE
PIERRE H. BERGERON
SQUIRE, SANDERS & DEMPSEY L.L.P.
One Maritime Plaza, Ste. 300
San Francisco, CA 94111
(415) 954-0200

December 1, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

In enacting the Indian Gaming Regulatory Act ("IGRA"), Congress adopted a statutory regime under which Indian tribes seeking to conduct the highest-revenue-generating – or "class III" – games on tribal lands must enter into a compact with the State in which the games are conducted. Congress specified the subjects on which a State might bargain in negotiating such compacts and imposed upon the States an obligation to negotiate in "good faith." This case presents the following questions about such compact negotiations:

1. Whether the Ninth Circuit erred in holding, in acknowledged conflict with the Second Circuit, that a State that has legalized some forms of class III gaming has no obligation to negotiate compacts with Indian tribes regarding other forms of such gaming.

2. Whether and to what extent a State may require an Indian tribe to sacrifice core elements of its sovereignty and to subject itself to state taxation and to state labor laws as a prerequisite to the State's agreement to enter into a gaming compact under IGRA.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 1
I. The Enactment of IGRA and Its Pertinent Provisions 2
II. The Compact Negotiations Leading to this Case. 5
III. The Ninth Circuit's Decision 7
A. The Revenue Sharing Trust Fund Provision 7
B. The Special Distribution Fund Provision 9
C. The Labor Relations Provision 10
REASONS FOR GRANTING THE WRIT 11
I. The Split Between The Circuits 11
II. The Ninth Circuit's Decision Disregards The Fundamental Nature Of Tribal Sovereignty. 16
III. The Ninth Circuit's Decision Is Erroneous. 20
A. The Provisions Upon Which the State Insisted Are Not Within Either Subpart (iii) or (vii) of Section 2710(b)(3)(C) of IGRA and Cannot Be Reconciled with Section 2710(d)(4) of the Act 21
B. The Ninth Circuit's Distinction Between "Authority to Impose" and "Authority to Negotiate" Is Illusory. 23
CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Big Lagoon Rancheria v. California, ___ F. Supp. 2d ____ (N.D. Cal. August 4, 2003) 19, 20
California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) ..... passim
Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993) 13
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 22
Ex parte Young, 209 U.S. 123 (1908) 5, 7
Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 22
Hotel Employees & Rest. Employees Int'l Union v. Davis, 21 Cal. 4th 585, 981 P.2d 990 (Cal. 1999) 5, 6, 7
In re Indian Gaming Related Cases, 147 F. Supp. 2d 1011 (N.D. Cal. 2001) 1
In re Indian Gaming Related Cases, 331 F.3d 1094 (9th Cir. 2003) 1
Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990) 6, 12, 13, 14
McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) 2
McCulloch v. Maryland, 17 U.S. 316 (1819) 19
Morton v. Mancari, 417 U.S. 535 (1974) 17
NLRB v. Pueblo of San Juan, 70 F.3d 1186 (10th Cir. 2000). 17
Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1994) 6, 12, 13, 14
Seminole Tribe v. Florida, 517 U.S. 44 (1996) 5, 7
United States v. Ron Pair Enters., 489 U.S. 235 (1987) 21
United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1301 (9th Cir. 1998) 15
United States v. Wheeler, 435 U.S. 313 (1978) 16

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 17
Williams v. Lee, 358 U.S. 217 (1959) 2

Statutes

Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 1
25 U.S.C. § 2710(d)(1)(B) 3, 11, 13
25 U.S.C. § 2710(d)(3) 3
25 U.S.C. § 2710(d)(3)(A) 2, 3
25 U.S.C. § 2710(d)(3)(C) 4, 10, 20, 21
25 U.S.C. § 2710(d)(3)(C)(iii) 21
25 U.S.C. § 2710(d)(3)(C)(vii) 8, 10, 18, 21
25 U.S.C. § 2710(d)(4) 4, 8, 23
25 U.S.C. § 2710(d)(7)(B) 4, 7
25 U.S.C. § 2710(d)(7)(B)(i) 11
25 U.S.C. § 2710(d)(7)(B)(ii)(II) 4
25 U.S.C. § 2710(d)(7)(B)(iii)(II) 4, 9
25 U.S.C. § 2710(d)(7)(B)(iv) 5
28 U.S.C. § 1254(1) 1

Other Authorities

Anthony J. Marks, Comment, *A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming?*, 17 Loy. L.A. Ent. L.J. 157 (1996) 13
Hearing on S. 487 Before Senate Comm. on Indian Affairs, 104th Cong. (1995) 24
Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 Ariz. ST. L.J. 25 (1997) 19, 24
S. Rep. No. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071 ..... 4, 9, 23

Constitutional Provisions

Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3 1

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. at 1a-41a) is reported at 331 F.3d 1094. The amended opinion and order of the district court (App. at 42a-60a) are reported at 147 F. Supp. 2d 1011.

JURISDICTION

The court of appeals' judgment was entered on June 11, 2003. App. at 1a. On August 1, 2003, a timely petition for rehearing and suggestion for rehearing *en banc* was denied. App. at 61a. On motion by Petitioner, the Court of Appeals on August 9, 2003 stayed its mandate until this Petition is determined. Justice O'Connor, sitting as Circuit Justice for the Ninth Circuit, granted Coyote Valley a thirty-day extension in which to file this petition, and it is timely filed within the extended time permitted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 2710(d) of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, as well as the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, both of which are reproduced in the Appendix at 63a-70a.

STATEMENT OF THE CASE

This case presents what has become the single most important and recurring question concerning State-Tribal compacts under IGRA. And as presented here, the question arises in the context of arguably the most significant demands by a State in the fifteen-year history of compact negotiations under IGRA. Further, the court of appeals' decision sustaining the State's demands is based squarely on, and

extends profoundly the effect of, a prior Ninth Circuit decision that conflicts with a decision of the Second Circuit.

Congress provided in IGRA that sovereign Indian Tribes may conduct Las Vegas-style (or "class III") gaming on their lands – and that the State may regulate such gaming – pursuant only to State-Tribal compacts, the terms of which the State must negotiate in "good faith." 25 U.S.C. § 2710(d)(3)(A). IGRA specifies the subjects that may be included in such compacts, and those subjects do not include taxes for purposes other than to defray the costs of regulating the gaming. Nor do they include labor relations, including union representation, at work places on tribal lands. Yet in this case, California categorically refused to enter into compacts with Tribes absent provisions on those subjects, and the Ninth Circuit sustained the State's position.

The appeals court did so principally on the ground that the State had offered the Tribes a significant "concession" – namely, that Tribes could conduct some games as to which California was not required to negotiate a compact at all. That concession, however, was real only under a prior decision of the Ninth Circuit, which the panel acknowledged is in conflict with the holding of another court of appeals having jurisdiction over substantial tribal gaming – the Second Circuit. Review by this Court is needed to resolve that conflict and to decide the scope of a State's obligations, and the limits, if any, of its power in negotiating gaming compacts under IGRA.

I. The Enactment of IGRA and Its Pertinent Provisions.

"[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168 (1973) (internal citations omitted). A State may infringe tribal sovereignty only to the limited extent Congress permits and then only in conformity with restrictions Congress may impose. *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("[A]bsent governing Acts of Congress, the question

has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.") Applying that principle, this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), rejected California's claimed right to regulate tribal gaming. Pointing to California's tolerance of a "substantial amount of gambling activities, including bingo" and that it "actually promote[s] gambling through its state lottery," this Court struck down the California law in question and reaffirmed the principle that the exercise by the States of "general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values." *Id.* at 208.

One year later, Congress enacted IGRA to address the States' authority to regulate tribal gaming. 25 U.S.C. § 2701 *et seq.* IGRA defines three classes of gaming, including class III or Las Vegas-style gaming. *Id.* § 2703. Such gaming is the highest revenue-generating and the subject of the greatest conflicts between States and Tribes. IGRA provides that States permitting class III gaming "for any purpose by any person, organization or entity" shall not interfere with the sovereign choice of Indian tribes to conduct such gaming on tribal lands. *Id.* § 2710(d)(1)(B); App. at 63a. In exchange, Congress granted the States some measure of regulatory control by requiring that the Tribes enter into compacts with the States in which the gaming is conducted. 25 U.S.C. § 2710(d)(3); App. at 65a-66a. However, Congress imposed upon the States the obligation to negotiate such compacts in "good faith." 25 U.S.C. § 2710(d)(3)(A); App. at 65a. The parties may negotiate, and the compacts "may include[,] provisions relating" to seven subjects:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C); App. at 65a-66a.

Congress specifically sought to foreclose any suggestion that IGRA confers on States the power to tax Indian gaming, whether as a means of revenue-sharing or otherwise. *See, e.g.*, S. Rep. No. 100-466, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083-84. Rather, Congress provided that, except for assessments or taxes to which the State and Tribe may agree under subpart (iii) of Section 2710(d)(3)(C), "[n]othing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge or other assessment upon an Indian tribe." 25 U.S.C. § 2710(d)(4); App. at 66a. Further, "*any* demand by the State for direct taxation of the Indian tribe or of any Indian lands is evidence that the State has not negotiated in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii)(II) (emphasis added); App. at 68a.

Tribes may enforce IGRA's good faith negotiation requirement through a suit in federal court. 25 U.S.C. § 2710(d)(7)(B); App. at 67a-69a. Once the tribe introduces some evidence to support its claim, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." 25 U.S.C.

§ 2710(d)(7)(B)(ii)(II); App. at 67a. A ruling in favor of the Tribe triggers a period of compulsory negotiation and then mediation. 25 U.S.C. § 2710(d)(7)(B)(iv)-(vii); App. at 68a-69a.

II. The Compact Negotiations Leading to this Case.

For decades, Petitioner Coyote Valley Band of Pomo Indians ("Coyote Valley" or "the Tribe") has sought a means to lift its members from profound poverty. As of 1994, on-reservation unemployment was ninety percent. The Tribe was unable to fund the most basic social services. That year, Coyote Valley opened the casino involved in this case. Today, the casino is the near-exclusive source of funding for health services, elderly homecare, housing, daycare, police, adult and youth education and training, and cultural and language preservation programs for the Tribe's members.

In response to a lawsuit filed by Coyote Valley and other Tribes seeking to force the State to comply with IGRA, California in 1999 commenced comprehensive negotiations over the adoption of gaming compacts. As relevant here, the State's negotiators imposed two preconditions. First, the Tribes had to agree to be taxed by "sharing dollars," ensuring the State a "very large revenue stream." Second, and in recognition of the fact that the then-Governor regarded "the unions as friends, as political friends," "reaching agreement with labor [wa]s a condition for signing the compact."

In exchange, the State agreed to permit the Tribes to conduct expanded forms of class III gaming that had previously been prohibited in California. Under Ninth Circuit precedent interpreting IGRA, California was required to negotiate only with respect to those specific types of class III games that the State had authorized private (*i.e.*, non-tribal) parties to conduct. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994) (rejecting expressly the holding of *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030-31 (2d Cir. 1990), that if a State permits *any* class III gaming, it must negotiate

with respect to *all* class III games); *see also Rumsey*, 64 F.3d at 1252-55 (Canby, J., joined by Pregerson, Reinhardt, and Hawkins, JJ., dissenting from the denial of rehearing *en banc*). California did not authorize private parties to conduct (and thus, according to *Rumsey*, IGRA did not make available to the Tribes) most Las Vegas-style gaming. *See Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 596-97 981 P.2d 990, 999 (Cal. 1999). The Governor, however, agreed that his administration would not oppose an amendment to the California Constitution, placed on the ballot by the Tribes, authorizing the Tribes to engage in a broader array of class III gaming – but only if the Tribes acquiesced to the taxes and labor relations provisions demanded by the State.

First, the Tribes would pay an up-front tax of $1250 for each new gaming machine, up to a maximum of 2000 machines. (This tax would cost Coyote Valley more than $2 million.) A second tax would require each Tribe to pay a yearly flat fee on each machine for which it had already paid the initial tax of $1250. (This second assessment would have amounted to $4.6 million annually for Coyote Valley if it operated the maximum number of machines allowed.) The State proposed to deposit those first two taxes into a "Revenue Sharing Trust Fund" ("RSTF") – to benefit other California Tribes that conduct limited or no gaming.

A third tax would require the Tribes to pay what the State's final offer denominated "[t]he State's share of the gaming revenue," in an amount from seven to thirteen percent of the "average gaming device net win" for each machine at the Tribes' casinos – the percentage increasing with the number of machines operated. The proceeds from this tax would go into a "Special Distribution Fund" ("SDF") that the California Legislature could appropriate for certain "gaming-related" expenses or for payment of "short-falls that may occur in the Revenue Sharing Trust Fund" as well as for "*any other purpose specified by the Legislature*."

The evidence in the District Court demonstrated that the three taxes combined, under optimal circumstances, would amount to 33.9% of Coyote Valley's gross gaming revenues, which would severely hamper and, in some cases, completely eliminate the services the Tribe was funding from gaming revenues.

Also, notwithstanding repeated and consistent objections by Coyote Valley, the State's final offer required the Tribe to address "organizational and representational rights of class III gaming employees" as well as "food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or associated hotel." Specifically, the Tribal Council of Coyote Valley was required to replace its existing tribal laws and policies with a "Labor Relations Ordinance" drafted by unions and approved by the State and other Tribes.

Thereafter, Coyote Valley sought a declaration, in the district court under Section 2710(d)(7)(B), that California had breached its obligation to negotiate a class III gaming compact with Coyote Valley in good faith. The district court ruled for California, and Coyote Valley appealed to the Ninth Circuit. It affirmed. [1]

III. The Ninth Circuit's Decision

A. The Revenue Sharing Trust Fund Provision

The appeals court held first that the State's insistence on the RSTF provision did not amount to the exercise of "authority to impose any tax, fee, charge or other assessment upon an Indian tribe" in violation of Section 2710(d)(4), because the State did not "impose" the RSTF at all. Rather, it

---

[1] This Court's holding in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that IGRA does not abrogate state sovereign immunity or permit actions under *Ex parte Young*, 209 U.S. 123 (1908), is inapplicable in this case because California has waived its immunity. *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 613-15, 981 P.2d 990, 1009-11 (1999).

"offered meaningful concessions in return for its demands." App. at 30a. Specifically, the State offered to negotiate a compact that would allow on Indian lands games not permitted elsewhere in the State, and, therefore, according to Ninth Circuit precedent, the State offered something it was not required to offer at all.

Second, the court emphasized that "[t]he idea of gaming tribes sharing revenue with non-gaming tribes traces its origins not to a State-initiated proposal, but rather to [a] tribe-drafted and tribe-sponsored [ballot proposition]" and that "[e]very other compacting tribe in California has agreed to the provision." App. at 34a.

Third, the court ruled "that the RSTF provision falls within the scope of subpart (3)(C)(vii)" of Section 2710(d) – as among the "other subjects that are directly related to the operation of gaming activities." App. at 30a-33a. The court found that the RSTF provision required by California advanced the Congressional goal of promoting "tribal economic development, self-sufficiency, and strong tribal governments" by "creating a mechanism whereby *all* California tribes – not just those fortunate enough to have land located in populous or accessible areas – can benefit from class III gaming activities in the state." *Id.* at 30a (internal citations omitted). According to the Ninth Circuit, that circumstance rendered the RSTF a "subject" that is "directly related to the operation of gaming activities." *Id.* at 30a-31a. To support that conclusion, the court turned to legislative history:

> [B]y limiting the proper topics for compact negotiations to those that bear a direct relationship to the operation of gaming activities, Congress intended to prevent compacts from being used as subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming. *See* S. Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084. In advocating the inclusion of the

> RSTF, the State has not sought to engage in such a subterfuge.

App. at 31a. In other words, the requirement of revenue sharing with non-gaming Tribes was deemed a subject "*directly related* to the *operation* of gaming activities," because it was not intended as a subterfuge to serve a purpose wholly unrelated to Indian gaming.

Finally, the court reasoned that, even assuming that the RSTF constitutes a "direct tax" and that the State "demanded" it, all within the prohibition of Section 2710(d)(7)(B)(iii)(II), under that statutory provision such a demand is merely "evidence that the State has not negotiated in good faith," not conclusive proof on the issue. App. at 33a-34a. The court concluded that "IGRA's legislative history . . . makes clear that the good faith inquiry is nuanced and fact-specific and is not amenable to bright-line rules." *Id.* at 34a. Given that the RSTF provision "does not put tribal money into the pocket of the State" but "redistributes gaming profits to other Indian tribes" and given that other tribes supported the concept, the State had sustained its burden to prove that its insistence on the RSTF provision did not violate the "good faith" requirement. *Id.*at 34a.

B. The Special Distribution Fund Provision

The SDF provision, as demanded by the State, would permit money to be used for five purposes: (i) to combat gambling addiction; (ii) to support state and local governments impacted by tribal gaming; (iii) to defray the costs of regulation under the compact; (iv) to pay any shortfalls in the RSTF; and (v) "any other purposes specified by the Legislature." App. at 35a. The Ninth Circuit applied the principle of *ejusdem generis* to "save" the SDF provision by limiting the fifth purpose, like the first four enumerated purposes, to matters related to gaming in some way. *Id.* at 35a. This, according to the appeals court, brought all five of the SDF's purposes within the category of permissible subjects for compact negotiations under Section

2710(d)(3)(C) that also justified the RSTF provision – namely subjects "directly related to the operation of gaming activities." App. at 36a. The court did not, however, explain how any of the purposes in the SDF that California proposed were *directly related* to the *operation* of the games.

The Ninth Circuit further determined that "[e]ven if the State's insistence on [the SDF] provision was indeed a 'demand' for a 'direct tax,' . . . circumstances exist in this case to justify the State's conduct." App. at 36a. Again emphasizing that such demand for direct taxation is merely some "evidence" of bad faith and is "not conclusive," the court found that in this case the consideration the State offered in exchange for the tax – again, permitting a broader range of class III gaming on Indian land compared to the rest of the State – was substantial enough and created "an exchange [that] was fair." *Id.* at 36a-38a. In light of some legislative history of IGRA and given that Indian tribes, other than Coyote Valley, and the Secretary of the Interior believed that "such an exchange is fair," the court sustained California's insistence on the SDF provision. *Id.* at 38a.

C. The Labor Relations Provision

Reasoning that "[w]ithout the 'operation of gaming activities,' the jobs [in the casinos and related facilities] would not exist; nor, conversely, could Indian gaming activities operate without someone performing these jobs," the court of appeals ruled that the labor provision also "directly related to the operation of gaming activities" within the meaning of Section 2710(d)(3)(C)(vii), and therefore constituted a permissible "other subject" for compact negotiations. App. at 39a-40a. Further, the appeals court ruled that IGRA permits courts to "consider the public interest of the State when deciding whether [the State] has negotiated in good faith, and a State's concern for the rights of its citizens employed at tribal gaming establishments is clearly a matter within the scope of that interest." *Id.* at 40a. In other words, regardless of whether the labor ordinance

truly was "directly related to the *operation* of gaming activities," the "public interest" referenced in Section 2710(d)(7)(B)(i) would justify the State in requiring unionization of employees at tribal casinos and associated facilities. App. at 39a-40a.

Finally, the appeals court ruled that, since the labor ordinance required by the State "provides only modest organizing rights to tribal gaming employees and contains several provisions protecting tribal sovereignty," the State's insistence that it be included in the compact does not "demonstrate the State's bad faith," especially given that representatives of some tribes "met with union representatives and participated in the shaping of the [ordinance]." App. at 40a-41a. Indeed, the court notes that that "all compacting tribes in California have adopted it." *Id.* at 41a.

REASONS FOR GRANTING THE WRIT

This Petition should be granted for three reasons: (1) a conflict among the circuits in construing Section 2710(d)(1)(B) of IGRA has become more acutely defined and has assumed new significance in light of the decision below – a decision that influences and will continue to influence Tribal-State compact negotiations in fundamentally important ways; (2) this Court needs to address the further, substantial erosion of tribal sovereignty and the perversion of "cooperative federalism" principles that the decision below represents and to determine what remains of tribal sovereignty and Congress' power to safeguard that sovereignty; and (3) the Ninth Circuit's decision is erroneous – in both its construction of IGRA and in its conception of the power ceded to the States by the Act – and the implications of those errors are far-reaching.

I. The Split Between The Circuits

While this Court's decision in *Cabazon* respected the principle that the States' power to infringe upon the sovereignty of Indian tribes is limited to what Congress

expressly authorizes (480 U.S. at 208), many saw the practical consequences of the decision as objectionable. The States could not regulate bingo on tribal lands if the State allowed bingo (or perhaps similar games) to be conducted by others within the State. The criminal prohibition/civil regulation distinction of *Cabazon* was, for some, not enough "protection" against Las Vegas-style gaming on tribal lands. IGRA was the legislative response to those concerns.

The Act redefined the balance between the power of the State to regulate Indian gaming and the power of the Tribes to regulate their own affairs. As to class III gaming, Congress declared such gaming on tribal lands lawful only if: (1) the Tribe and the National Indian Gaming Commission ("NIGC"), established by IGRA, authorized the gaming; (2) the gaming was located in a State that "permits such gaming for any purpose by any person, organization or entity"; and (3) the gaming is conducted under, and in conformity with, a Tribal-State compact.

With respect to the second of these requirements, the Ninth Circuit in this case acknowledged that its decision is irreconcilable with the Second Circuit's decision in *Mashantucket*, 913 F.2d 1024 (1990). *See* App. at 8a. There, the Second Circuit held that when a "State permit[s] other types of class III games," as California does, "it [can]not refuse to negotiate over the subset of class III games that [petitioner] sought to conduct." App. at 7a. But the Ninth Circuit recognized that it had previously "rejected [that] construction of IGRA in *Rumsey*," albeit over a substantial en banc dissent urging the adoption of the Second Circuit's holding, 64 F.3d at 1252-55 (Canby, J., dissenting on behalf of four judges). App. at 8a; *see* 64 F.3d at 1253 (explaining that the case presented a question of "major significance in the administration of" [IGRA] and that the Second Circuit

had "arriv[ed] at a conclusion precisely opposite to that of" the Ninth Circuit).[2]

In *Mashantucket*, the Second Circuit held that IGRA required the State of Connecticut to negotiate with Indian tribes regarding forms of class III gaming *without regard* to restrictions on those forms of gaming in non-tribal casinos. 913 F.2d at 1030. The court held that IGRA codified this Court's holding in *Cabazon* that a State may *per se* prohibit gaming by tribes only to the extent that form of gaming is not merely illegal but also violates the State's public policy. *Id.* at 1029. The Second Circuit further held that the relevant provision of IGRA – providing that the State must enter into negotiations regarding class III gaming if it "permits *such gaming* for any purpose by any person, organization, or entity" – was satisfied so long as the State permitted any form of class III gaming. *Id.* at 1032 (citing 25 U.S.C. § 2710(d)(1)(B) (emphasis added)). The Second Circuit recognized that, under the State's contrary view, "[t]he compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would [] become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible." *Id.* at 1031.

In *Rumsey*, the Ninth Circuit avowedly reached precisely the opposite result, adopting the Eighth Circuit's holding in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993). *See Rumsey*, 64 F.3d at 1258. The Ninth Circuit rejected the claims of various Tribes that, because California permitted some forms of class III gaming, it was required by IGRA to negotiate regarding "certain stand-alone electronic gaming devices and live banking and percentage card games." *Id.* at 1255. The Ninth Circuit explicitly rejected the

---

[2] The conflict has been repeatedly recognized. *See, e.g.*, Anthony J. Marks, Comment, *A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming?*, 17 Loy. L.A. Ent. L.J. 157, 194 (1996) ("The Ninth Circuit's decision in *Rumsey* created a split among the circuits.").

argument that Congress intended to embrace this Court's *Cabazon* decision in IGRA. *Id.* at 1257. According to the Ninth Circuit, IGRA "does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming." *Id.* at 1258. Rather, "a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have." *Id.*

This square circuit conflict is outcome determinative in the present case. The Ninth Circuit here rested its holding on the rationale that, even if California's demands for a compact violated the strictures Congress enacted in IGRA and impinged on matters central to tribal sovereignty, the State acted in "good faith" because it entered into negotiations that were not required by IGRA – namely, negotiations over forms of class III gaming that were not permitted in non-tribal casinos. App. at 30a. After acknowledging the split between its own precedent and the Second Circuit's decision in *Mashantucket*, the Ninth Circuit explained, "[o]ur decision in *Rumsey* meant that [in this case] the State had no obligation to negotiate with tribes over the most lucrative forms of class III gaming." App. at 8a. The State's willingness to negotiate notwithstanding the supposed absence of any obligation rendered its conduct lawful:

> We do not hold that the State could have, without offering anything in return, taken the position that it would conclude a Tribal-State compact with Coyote Valley only if the tribe agreed to pay into the RSTF. Where, as here, however, a State offers *meaningful concessions* in return for fee demands, it does not exercise 'authority to impose' anything. Instead, it exercises it authority to negotiate, which IGRA clearly permits.

App. at 32a (emphasis added). According to the Ninth Circuit, the State's critical concession was its willingness to negotiate regarding the full range of class III gaming. *Id.* at

33a ("In this case, Coyote Valley cannot seriously contend that the State offered no real concessions in return for its insistence on the RSTF provision. Under our holding in *Rumsey*, the State had no obligation to enter any negotiations at all with Coyote Valley concerning most forms of class III gaming.").

While the circuit conflict in question is a decade old, its significance has not diminished in that time. To the contrary, with the decision in this case, the conflict has assumed profound importance to the balance of sovereign power and autonomy crafted by Congress in IGRA and to dynamics of compact negotiations which are ongoing today and those that will occur in the future. Indeed, in California alone, there are 107 federally recognized tribes, and it is estimated that fifty-eight of them engage in gaming. For its part, the State has recently made clear its intention to increase "revenue sharing" with the Tribes, and, with the decision in this case, there are no *substantive* limitations on the subjects or purposes the State may pursue in negotiating new or amended compacts with the Tribes.[3]

States and Tribes will continue to negotiate compacts. If the Ninth Circuit's decision in this case remains as the sole guide on the "good faith" requirement, it will undoubtedly influence compact negotiations in ways contrary to the balance of sovereign power that Congress intended, regardless of whether a mechanism for judicial intervention is available as "leverage" in all states. *See* n.1, *supra*. Letting the Ninth Circuit's decision stand as the only guidance States and Tribes have in determining the substantive rules that govern compact negotiations has significant implications, as further demonstrated in the next Section of this Petition.

---

[3] As the Ninth Circuit observed *before* its decision in the present case, following this Court's decision in *Seminole Tribe*, "nothing now protects the Tribe if the State refuses to bargain in good faith or at all; the State holds all the cards." *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998).

II. The Ninth Circuit's Decision Disregards The Fundamental Nature Of Tribal Sovereignty.

According to the Ninth Circuit, so long as a State offers a Tribe something substantial in exchange for what the State wants, there are virtually no limits on what the State may require as a condition to entering into a gaming compact. App. at 32a. What that ruling means to the essence of tribal sovereignty is at stake here.

1. Sovereignty starts with a presumption of "absoluteness" to which is appended from one or more sources certain qualifications and limitations. *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (citing Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1942))) ("Perhaps the most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather are inherent powers of a [now] limited sovereignty which has never been extinguished. *Each* Indian tribe begins its relationship with the federal government as a sovereign power, recognized as such in treaty and legislation.") (emphasis added).

Although Indian tribes are no longer "possessed of the full attributes of sovereignty," this Court "has consistently recognized that Indian Tribes retain attributes of sovereignty over both their members and their territory, and that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Cabazon*, 480 U.S. at 207 (internal citations omitted); *Wheeler*, 435 U.S. at 323 ("[U]ntil Congress acts, the tribes retain their existing sovereign powers."). In particular, the "power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980). Similarly,

regulation of labor and employment on tribal lands is an attribute of sovereignty that Congress has not divested and that has not impliedly been lost by the "dependent status" of the Tribes. *Morton v. Mancari*, 417 U.S. 535, 548 (1974) (acknowledging "'Congress' recognition of the long-standing federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment"); *see also NLRB v. Pueblo of San Juan*, 70 F.3d 1186, 1194-1196 (10th Cir. 2000).

Consequently, absent congressional action, Indian tribes are possessed of sovereign power and correspondingly the inherent right – not merely a State-conferred privilege – to conduct gaming on tribal lands free from State-imposed taxation and regulation, including regulation of labor and employment on those lands. And undeniably, those attributes of remaining tribal sovereignty are of fundamental importance. Gaming is among the most important assets of Tribes today. It represents the opportunity to overcome generations of deprivation and poverty while still permitting the Tribes to maintain a significant measure of autonomy and cultural identity – to be separate from, but still part of, the life and economy of the nation as a whole.

In enacting IGRA, Congress of course did qualify tribal sovereignty, but it did not eliminate it, and Congress did not reduce sovereignty to a matter of mere privilege controlled by the State. Instead, Congress legislated that the States could infringe the otherwise inviolate autonomy of the Tribes, but only through compacts negotiated sovereign-to-sovereign. In order to ensure that compacts would be so negotiated and that tribal sovereignty would be diminished in the negotiations only to the extent required by legitimate interests of the States, Congress told the States explicitly what they could and what they could not require in compacts.

The reasoning of the court below utterly vitiates those principles and with that negates core attributes of tribal sovereignty that Congress preserved. First, the concept of

sovereign-to-sovereign negotiations and the standards expected in them has been replaced with an essentially commercial notion of "good faith," depending on "fairness" and "reasonableness" of the terms demanded by a State determined by subjective and even political judgments of courts or – in most States, where sovereign immunity precludes judicial intervention – by the States themselves.

Second, under the decision below, a State may condition Indian gaming within its borders not on substantive requirements defined and delimited by Congress, as trustee of Indian sovereignty, but on virtually any requirements the State chooses – so long as it can make out some connection, however remote, to gaming. If ever the strict construction of a regulatory statute were demanded, this is the case.[4]

In short, unless overturned by this Court, the decision below means that a State may satisfy its statutory "good faith" obligation under IGRA even if it substantially ignores the plain language of the Act and the strictures it imposes – so long as it makes "concessions" that generate more revenue for the Tribes and the State. This is hardly "sovereignty" in any meaningful sense of the word.

By, in effect, reading the strictures out of IGRA, the Ninth Circuit has sanctioned a Hobson's Choice for Indian

---

[4] Especially troubling in this connection is the lower court's application of *ejusdem generis* to the phrase, "any other purposes specified by the [California] Legislature." App. at 35a. The effect of that ruling is that the scope of the quoted phrase will be determined by whatever the California legislature deems a purpose "directly related to the operation of gaming activities" under Section 2710(d)(3)(C)(vii). The Ninth Circuit articulated no reasoned limits to the quoted phrase and included, for example, "gambling addiction" and "shortfalls in the RSTF" as matters "directly related" to the "operation of gaming." Thus, by articulating any connection to gaming or its consequences, the States may create, in effect, new categories that are permissible subjects for compact negotiations. Such a "delegation" of Congressional power and such an invitation to further infringement of tribal sovereignty by the States was surely not intended by the "other purposes" language of Section 2710(d)(3)(C)(vii). *See also* Section III, *infra*.

Tribes: They must either forgo the opportunity to game and forfeit their sovereign and statutorily defined right to do so, or they must "sell" core attributes of their sovereignty and autonomy. This is a choice Congress did not intend.

2. Also important to the future of tribal sovereignty is the Ninth Circuit's repeated reliance on the fact that other tribes in California approved compacts containing provisions that Coyote Valley rejected. Yet, "[t]he reality of tribal sovereignty," as one scholar reminds us, "is that each tribe is a unique and separate entity." Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 81 (1997). That notion was lost on both the State and the Ninth Circuit in this case. Pointing to the fact that many other tribes had acceded to the State's demands, the panel accepted the State's position that it had bargained in good faith. Lumping tribes together and presuming that what is acceptable to some *should* be acceptable to others and therefore must be legally permissible violates the essential character of sovereignty.

3. Finally, this Court long ago recognized that the power to tax is the power to destroy. *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). California has wielded this power in a manner that will impact the relationships between States and Tribes and among Tribes with respect to subjects other than gaming. Indeed, States can now with relative impunity hold out the carrot of gaming, which for many Tribes represents economic salvation, to achieve any number of other State objectives that do not directly relate to gaming. Illustrative of this phenomenon is *Big Lagoon Rancheria v. California*, ___ F. Supp. 2d ____ (N.D. Cal. August 4, 2003), a case consolidated with this one in the district court. Recently, the district court had occasion to consider and apply the rationale of the Ninth Circuit's decision in this case:

> [T]he State may negotiate for provisions regarding environmental and land use issues as part of the

> compacting process, [and] . . . could demonstrate the good faith of its bargaining position by offering the Tribe concessions in return for the Tribe's compliance with requests with which the other tribes were not asked to comply.

___ F. Supp. 2d at ___. That ruling evinces the same thinking underlying the decision of the court of appeals in this case: Regardless of whether a particular demand by a State in compact negotiations "fits comfortably" in one of the permissible subject categories in Section 2710(d)(3)(C), the demand will not constitute a lack of good faith if it is accompanied by concessions that make the demand appear to the court subjectively "fair." Under this reasoning, the Ninth Circuit and the district courts within it have already permitted State infringements on tribal sovereignty in the areas of taxation, labor relations, and environmental regulation. Based on this proliferation of "exceptions," there are no longer any meaningful limits to the subjects on which a State may infringe tribal sovereignty, and Congress' delineation of permissible infringements and express prohibition of others is rendered nugatory.

III. The Ninth Circuit's Decision Is Erroneous.

The panel below concluded that even if IGRA contemplates that some demands by States in compact negotiations would *per se* constitute a lack of good faith, in this case the demands made by California were permitted by IGRA. App. at 33a-34a. To reach that result, the panel, in effect, rewrote key provisions of IGRA, enlarging the reasonable (and at times, plain) meaning of some language and deleting other language. *See, e.g., id.* at 30a, 35a. The panel also found that, in fact, California did not exercise "authority to impose" taxes or other burdens on Coyote Valley prohibited by IGRA but rather merely exercised the "authority to negotiate." *Id.* at 30a. In that respect, the panel's decision defeats the very purpose Congress articulated for imposing the good faith requirement.

A closer look at those points and the Ninth Circuit's reasoning is in order.

A. The Provisions Upon Which the State Insisted Are Not Within Either Subpart (iii) or (vii) of Section 2710(b)(3)(C) of IGRA and Cannot Be Reconciled with Section 2710(d)(4) of the Act

There is no dispute that the three taxes in question here are not "assessments by the State necessary to defray the costs of regulating [gaming] activity," under subpart (iii) of Section 2710(d)(3)(C). Recognizing this, the Ninth Circuit turned instead to subpart (vii), which permits negotiations over "other subjects that are directly related to the operation of gaming activities." App. at 30a, 36a. In holding that the taxes here are such "other subjects," the panel overlooked a basic tenet of statutory construction – that words in a statute are to be given their ordinary and plain meaning, unless a manifest legislative intent to the contrary is demonstrated.

The words "other subjects" at the beginning of subpart (vii) necessarily restricts that subpart to subjects *other* than those addressed in the first six subparts of Section 2710(b)(3)(C) – that is, other than (i) the application of criminal and civil laws; (ii) the allocation of State and tribal jurisdiction; (iii) *assessments by the State*; (iv) taxation by the tribe; (v) remedies for breach of the Compact; and (vi) standards for gaming operations and maintenance of gaming facilities, including licensing. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241-42 (1987). Assessments by the State are expressly addressed in subpart (iii); therefore, that subject is *not* one of the "other subjects" that might fall within subpart (vii).

Furthermore, the panel construed the phrase "directly related to the operation of gaming activities" in subpart (vii) so broadly as to render meaningless three words in the phrase – "directly related" and "operation." App. at 30a, 36a. The revenue sharing provisions on which the State insisted have nothing to do with gaming *operations*. They have to do with

how the money generated from gaming is spent. The fact that gaming activities generated the funds might render the *distribution* of the funds related in *some* way to gaming activities, but not to the manner in which the games are *operated*. For example, taking revenue from a gaming Tribe in order to give it to a non-gaming Tribe, through the RSTF, is not "directly related" to the "operation" of the games. *Cf. Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 573-75 (1995).

Similarly, the stated objectives of the Special Distribution Fund – "to address gambling addiction," to "support state and local agencies impacted by gambling," to "fund implementation and administration" of the compact, to "pay any shortfalls in the RSTF," and finally "*for any other purpose specified by the legislature*" – are obviously not purposes with a "direct" relationship to gaming "operations." The Ninth Circuit's construction effectively takes the word "operation" out of the statute. Moreover, whatever relationship does exist between the gaming operations that generate the funds and the distribution of those funds or the purposes to which the State requires the funds be put is certainly not a *direct* relationship. The lower court has erased the words "directly related" from the statute as well.

As to the labor ordinance, the Ninth Circuit reasoned that labor relations must be "directly related" to the "operation" of gaming because without gaming there would be no jobs and without people in the jobs there would be no gaming. App. at 34a-40a. This reasoning camouflages the plain truth that how much an employee is paid, whether he or she receives overtime, or what kind of benefits he or she receives is not "directly related" to the games in question or to the *operation* of those games – any more than the architecture or decor of a gaming casino is "directly related" to gaming operations. Again, the Ninth Circuit legislated well beyond the language Congress used. S. Rep. No. 100-466, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083-84 ("The Committee does

not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands.").

B. The Ninth Circuit's Distinction Between "Authority to Impose" and "Authority to Negotiate" Is Illusory.

Finally, the Ninth Circuit held that, by insisting on the provisions it did, California exercised its "authority to negotiate," not the "authority to impose" prohibited by Congress in Section 2710(d)(4). App. at 30a. But as alleged by Coyote Valley, and indeed upon the uncontroverted evidence of record, the State here included the three taxes and the labor ordinance requirement in what the State itself called its "final offer," on September 9, 1999. *Id.* at 17a-18a. The finality of that offer was confirmed in a December 8, 1999 letter in which the State rejected *all* counter proposals by Coyote Valley, *without altering one word of the demands in the September 9 "final offer" and making no alternative proposals whatsoever.* *Id.* at 23a. The "negotiations" to which the Ninth Circuit refers had ended – and they had ended with the State *requiring* the three taxes and the labor ordinance as non-negotiable conditions of the compact. The court of appeals' decision is premised on a distinction between "imposition" and "negotiation" that is at best linguistic.

Alternatively, the Ninth Circuit noted that "the State remained willing to meet with the tribe for further discussions." App. at 23a. If the negotiations had not truly ended in 1999 and were ongoing in any meaningful way thereafter, then the factual and legal landscape of the negotiation changed drastically in March 2000. At that time, California Proposition 1A was passed. It legalized all the gaming on tribal lands for which Coyote Valley had been seeking a compact. This was three months *before* the district court found that the State had sustained its burden on the "good faith" requirement, without mentioning Proposition 1A or the concession the Ninth Circuit found "significant" three

years later. These circumstances provide further context for the appeals court's conclusion that the State's willingness to negotiate a compact that would allow class III gaming on Coyote Valley land, when the State was not required to permit such gaming, amounted to a "real concession" by the State.

CONCLUSION

The current conflict between the States and Tribes occurs against the backdrop of a similar conflict between the States and the federal government. But that should not obscure the importance of this case:

> Although the halls of Congress are ringing today with the cries for more states' rights, we cannot and must not let these cries drown out the principles underlying our solemn trust obligations to American Indians and the government-to-government relationship with Indian tribes. Otherwise, we are no better and no wiser than those who sought to remove Indians to the most remote and desolate parts of our country with empty promises of prosperity for so long as the grass is green and the river runs.

Hearing on S. 487 Before Senate Comm. on Indian Affairs, 104th Cong. 2-3 (1995) (Statement of Senator John McCain, Comm. Chairman, on the IGRA Amendments of 1995); *see also* Tsosie, 29 ARIZ. ST. L.J. at 33. This case does indeed present questions of exceptional importance with far-reaching implications for the future. It should be heard and decided finally by this Court.

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

RODNEY R. PATULA
(Counsel of Record)
EDUARDO G. ROY
AMY E. ROSE
PIERRE H. BERGERON
SQUIRE, SANDERS & DEMPSEY L.L.P.
One Maritime Plaza, Ste. 300
San Francisco, CA 94111
(415) 954-0200

December 1, 2003

APPENDIX

In re: INDIAN GAMING RELATED CASES CHEMEHUEVI INDIAN TRIBE; ELK VALLEY RANCHERIA; HOOPA VALLEY INDIAN TRIBE; HOPLAND BAND OF POMO INDIANS; REDDING RANCHERIA; SMITH RIVER RANCHERIA, Plaintiffs, and COYOTE VALLEY BAND OF POMO INDIANS, Plaintiff-Appellant,

v.

THE STATE OF CALIFORNIA, Defendant-Appellee.

No. 01-16283

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

December 3, 2002, Argued and Submitted, San Francisco, California

June 11, 2003, Filed

COUNSEL: Eduardo G. Roy, San Francisco, California, for the appellant.

Sara J. Drake, Marc A. Le Forestier, and Christine Murphy, Office of the Attorney General, Sacramento, California, for the appellee.

JUDGES: Before: Myron H. Bright,* Michael Daly Hawkins and William A. Fletcher, Circuit Judges. Opinion by Judge William A. Fletcher.

* The Honorable Myron H. Bright, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

OPINION

W. FLETCHER, Circuit Judge:

The Coyote Valley Band of Pomo Indians ("Coyote Valley") contends that the State of California ("the State") has refused to negotiate in good faith with the tribe to

conclude a Tribal-State compact, as required by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d)(3)(A), and moved in the district court for an order that would require it to do so, 25 U.S.C. § 2710(d)(7)(B)(iii). In a carefully considered decision, the district court denied the motion and entered judgment for the State. We agree with the district court that the State has negotiated in good faith within the meaning of IGRA. We therefore AFFIRM.

I. Background

The historical background against which Coyote Valley and the State negotiated is important to an understanding of this case. We begin with the events leading up to the Supreme Court's landmark decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In the 1970s, some California tribes began to operate bingo halls on their lands as a way to generate revenue. "Such activities were controversial because the tribes generally refused to comply with state gambling laws, a situation that developed into a serious point of contention with [the] state government[]." *Flynt* v. *California Gambling Control Comm'n*, 104 Cal. App. 4th 1125, 1132, 129 Cal. Rptr. 2d 167 (2002). The State responded by attempting to enforce Cal. Penal Code § 326.5 (the "bingo statute") against these tribes. See *Cabazon*, 480 U.S. at 205. California's bingo statute did not entirely prohibit bingo operations within the State, but it permitted only certain entities to run such operations and imposed various other requirements. See *id.* at 205, 209. The Cabazon and Morongo Bands of Mission Indians, who were operating bingo halls on their reservations in Riverside County, California, contended that the State lacked authority to enforce the statute against Indian tribes. See *id.* at 206.

In response, the State contended that Congress had expressly consented to its exercise of jurisdiction over tribal bingo by passing Public Law 280, 18 U.S.C. § 1162. See *Cabazon*, 408 U.S. at 206. Public Law 280, originally enacted

in the 1950s, "granted California and certain other states jurisdiction over criminal violations and civil causes of action on Indian reservations," but "left civil regulatory jurisdiction in the hands of the Tribes." *Sycuan Band of Mission Indians* v. *Roache*, 54 F.3d 535, 539 (9th Cir. 1994); see also *Cabazon*, 480 U.S. at 208 ("[A] grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values."). The State contended that because a violation of the bingo statute constituted a criminal misdemeanor under California law, Public Law 280 permitted its enforcement on tribal lands. *Cabazon*, 480 U.S. at 209.

In 1987 in *Cabazon*, the Supreme Court ruled in favor of the tribes, adopting a distinction originally drawn by this court between "criminal/prohibitory" and "civil/regulatory" state laws:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation.

Id. Because California permitted "a substantial amount of gambling activities, including bingo, and actually promote[d] gambling through its state lottery," the Court concluded that the State "regulate[d] rather than prohibit[ed] gambling in general and bingo in particular." *Id.* at 211. Because there were no exceptional circumstances that warranted the assertion of State jurisdiction over tribal bingo operations, the Court held that the State lacked authority under Public Law 280 to enforce the bingo statute on Indian lands. *Id.* at 221-22.

After the Court's decision in *Cabazon*, States sought recourse on Capitol Hill. Congress passed IGRA the next year, in 1988. As Judge Levi has recently written:

> IGRA was Congress' compromise solution to the difficult questions involving Indian gaming. The Act was passed in order to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "to shield [tribal gaming] from organized crime and other corrupting influences to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2701(1), (2). IGRA is an example of "cooperative federalism" in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.

Artichoke Joe's v. *Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002) (alteration in original).

IGRA creates three classes of gaming, each subject to a different level of regulation. Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations," 25 U.S.C. § 2703(6), and its regulation is left exclusively within the jurisdiction of the Indian tribes, *id.* § 2710(a)(1). Class II gaming includes bingo, *id.* § 2703(7)(A)(i), and certain card games, *id.* § 2703(7)(A)(ii), but excludes any banked card games, electronic games of chance, and slot machines, *id.* § 2703(7)(B).[1] The regulation of class II gaming is also left within the jurisdiction of the tribes, but is subject to federal-state regulation as set forth in IGRA. *Id.* § 2710(a)(2); see, e.g., *id.* § 2710(b)-(c). Class III gaming, at issue in this case, includes "all forms of gaming that are not class I gaming or class II gaming," 25 U.S.C. § 2703(8); in short, it includes the

---

[1] "In banked or percentage card games, players bet against the "house" or the casino. In "nonbanked" or "nonpercentage" card games, the "house" has no monetary stake in the game itself, and the players bet against one another." *Artichoke Joe's*, 216 F. Supp. 2d at 1092 n.3.

types of high-stakes games usually associated with Nevada-style gambling. Class III gaming is subject to a greater degree of federal-state regulation than either class I or class II gaming.

Given that class III gaming can be "a source of substantial revenue for the Indian tribes and a significant rival for traditional private sector gaming facilities," its regulation "has been the most controversial part of [ ] IGRA and the subject of considerable litigation between various Indian tribes and the states." *Flynt*, 104 Cal. App. 4th at 1134; see also *Hotel Employees & Rest. Employees Int'l Union* v. *Davis* (*Hotel Employees*), 21 Cal. 4th 585, 596, 88 Cal. Rptr. 2d 56, 981 P.2d 990 (1999). IGRA makes class III gaming lawful on Indian lands only if such activities are: (1) authorized by an ordinance or resolution adopted by the governing body of the Indian tribe and the Chairman of the National Indian Gaming Commission;[2] (2) located in a State that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State and approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(1), (3)(B).

IGRA's compact requirement grants States the right to negotiate with tribes located within their borders regarding aspects of class III tribal gaming that might affect legitimate State interests. See *id.* § 2710(d)(3)(C); Kevin K. Washburn, Recurring Problems in Indian Gaming, 1 WYO. L. REV. 427, 429 (2001) ("In contrast to Class II gaming, Congress realized that states were likely to have more serious and more legitimate public policy concerns related to more expansive

---

[2] The Commission is a federal regulatory agency created by IGRA that oversees the business of Indian gaming in order to ensure its lasting integrity. It performs a variety of functions, such as the review of management contracts that tribes enter with outside parties to run tribal casinos. See 25 U.S.C. § 2704.

casino-type gaming which is defined as "Class III" gaming in IGRA. Accordingly, . . . Congress limited Class III gaming to those states that already allow some measure of Class III gaming and gave states a voice in tribal decisions to conduct such gaming."). IGRA also imposes a concomitant obligation upon States to conduct those negotiations in good faith, 25 U.S.C. § 2710(d)(3)(A), and grants tribes the right to enforce that obligation by way of federal suit, *id.* § 2710(d)(7)(A).

IGRA provides that if no compact has been entered 180 days after an Indian tribe has requested that the State enter into compact negotiations, the tribe may bring suit in federal court. *Id.* § 2710(d)(7)(A)(i), (B)(i). If the court concludes that the State has failed to conduct negotiations in good faith, it shall order the State and the tribe to conclude a compact within a 60-day period. *Id.* § 2710(d)(7)(B)(iii). If the tribe and the State fail to do so, they must each submit to a court-appointed mediator a proposed compact representing their last best offer. *Id.* § 2710(d)(7)(B)(iv). The mediator will choose between the two proposed compacts the one that best comports with the terms of IGRA. *Id.* § 2710(d)(7)(B)(iv)-(v). If the State does not accept the mediator's chosen compact within 60 days, the Secretary of the Interior shall prescribe, consistent with the mediator's chosen compact and with the terms of IGRA, the conditions upon which the tribe may engage in class III gaming. *Id.* § 2710(d)(7)(B)(vii).[3]

The passage of IGRA did not end the fight over Indian gaming in California. After the statute's enactment, certain California tribes (including Coyote Valley) sought to negotiate compacts with the State permitting the operation of class III games on their respective reservations.[4] *Flynt*, 104

---

[3] These remedial provisions have been substantially limited by the Supreme Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44, (1996). See *infra*, note 5.

[4] Coyote Valley first requested that the State enter into Tribal-State compact negotiations by letter dated March 29, 1992.

Cal. App. 4th at 1136. Among the class III games over which these tribes sought to negotiate were live banked or percentage card games and stand-alone electronic gaming machines (similar to slot machines). *Rumsey Indian Rancheria of Wintun Indians* v. *Wilson*, 64 F.3d 1250, 1255 (9th Cir. 1994), amended by 41 F.3d 421, 99 F.3d 321 (9th Cir. 1996). These particular games were not permitted under California law, see Cal. Penal Code §§ 330, 330a, 330b, but the State did allow other forms of class III gaming, such as non-electronic keno and lotto. *Rumsey*, 64 F.3d at 1255.

During the Administration of Governor Pete Wilson, the State refused to negotiate with the tribes with respect to the class III games they sought to conduct. It took the position that it had no obligation to do so, pointing to 25 U.S.C. § 2710(d)(1)(B), which provides that "class III gaming shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity . . . ." (Emphasis added.) In the State's view, because it did not permit live banked or percentage card games or slot machine-like devices, it had no duty to negotiate with respect to them. *Rumsey*, 64 F.3d at 1256.

The tribes argued that the phrase "such gaming" in § 2710(d)(1)(B) refers to class III gaming in general, rather than specific class III games in particular. In the tribes' view, because the State permitted other types of class III games, it could not refuse to negotiate over the subset of class III games that they sought to conduct. See *Mashantucket Pequot Tribe* v. *Connecticut*, 913 F.2d 1024, 1030 (2d Cir. 1990) (agreeing with the tribes" position); *Washburn*, 1 WYO. L. REV. at 442 ("[T]he language can plainly be interpreted to indicate that if a state allows any Class III gaming activities, IGRA requires states to negotiate with tribes generally about Class III games and does not necessarily limit the negotiations to the particular Class III games that are offered

under state law. Under this reading, the language constitutes an adoption of the criminal-prohibitory versus civil-regulatory distinction set forth in Cabazon.").

We rejected the tribes' construction of 25 U.S.C. § 2710(d)(1)(B) in 1994 in *Rumsey*. We held that

> IGRA does not require a state to negotiate over one form of Class III gaming simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a gaming activity "for any purpose by any person, organization, or entity," then it also must allow Indian tribes to engage in that same activity. 25 U.S.C. § 2710(d)(1)(B). In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.

64 F.3d at 1258. Accord *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993) ("The 'such gaming' language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit."). Compare *Mashantucket*, 913 F.2d at 1029-32; *Rumsey*, 64 F.3d at 1252-55 (Canby, J., joined by Pregerson, J., Reinhardt, J., and Hawkins, J., dissenting from the denial of rehearing en banc).[5]

Our decision in *Rumsey* meant that the State had no obligation to negotiate with tribes over the most lucrative

---

[5] Prior to our amended decision in *Rumsey*, the Supreme Court held in *Seminole Tribe* v. *Florida*, 517 U.S. 44, (1996), that the Eleventh Amendment prevents a tribe from enforcing the remedial provisions of IGRA against a State in federal court absent State consent. See *Washburn*, 1 WYO. L. REV. at 430 ("The Seminole decision has thrown the compacting process and Indian gaming itself into some disarray. While tribes may not lawfully engage in Class III gaming without a compact, tribes now lack the power to force states to come to the table to negotiate."). Because the State had agreed in *Rumsey* not to plead the Eleventh Amendment as a jurisdictional bar, *Seminole Tribe* did not affect this court's jurisdiction on appeal. See 64 F.3d at 1255 n.3.

forms of class III gaming. The Wilson Administration also refused to negotiate compacts covering class III games that the State did permit, unless and until the tribe requesting such negotiations ceased engaging in unlawful class III gaming -- i.e., class III gaming conducted in the absence of a valid Tribal-State compact as required by 25 U.S.C. § 2710(d)(1)(C).[6] See *Hotel Employees*, 21 Cal. 4th at 597 ("[A] number of the tribes commenced and continued class III gaming activities without tribal/state compacts; in response, Governor Wilson refused to negotiate further until they ceased such gaming activities."). Because IGRA grants the federal government exclusive jurisdiction to prosecute any violations of State gambling laws in Indian country, the State's refusal to engage in negotiations was one of the few forms of leverage it possessed to force tribes to comply with IGRA's compacting requirement. See *Sycuan Band of Mission Indians*, 54 F.3d at 538-40; 18 U.S.C. § 1166 (making "all State laws pertaining to the licensing, regulation, or prohibition of" class III gaming applicable in Indian country in the absence of a valid Tribal-State compact, but granting the federal government exclusive jurisdiction to prosecute violations). In light of the Supreme Court's ruling in Seminole Tribe, see *supra* note 5, the tribes could not challenge the legitimacy of this position under IGRA absent State consent to suit, and such consent was not forthcoming. (Governor Wilson did offer to waive the State's sovereign immunity to suits brought by tribes pursuant to IGRA, but only if and when he received written certification that the tribes had ceased all illegal class III gaming.)

Rather than give up the ongoing class III gaming operations on which many tribes had come to rely, the tribes

---

[6] Beginning in November of 1994, Coyote Valley began conducting class III gaming in the absence of a Tribal-State compact. It continues to do so at present.

went directly to the people of California.[7] A coalition of California tribes drafted and put on the November 1998 State ballot Proposition 5, a statutory initiative containing a model compact:

> The proposition, which amended state law but not the State constitution, required the state to enter into a model "Tribal-State Gaming Compact" with Indian tribes to allow certain class III gambling activities, such as banked card games and slot machines. Proposition 5 obligated the governor to execute compacts as a ministerial act within 30 days after any federally recognized Indian tribe requested such an arrangement. Under the plan, the compacts were deemed approved if the governor took no action within 30 days.

Flynt, 104 Cal. App. 4th at 1136 (internal citations omitted). See generally Cal. Gov. Code §§ 98000-98012; *Hotel Employees*, 21 Cal. 4th at 598-601 (summarizing the provisions of Proposition 5).

Relevant to this appeal, Proposition 5's model compact created three funds to which compacting tribes would contribute a set percentage of their net wins from tribal gaming terminals: (1) a "Nongaming Tribal Assistance Fund," from which distributions were to be made to non-gaming tribes to fund social services; (2) a "Statewide Trust Fund," from which distributions were to be made to counties in California to supplement emergency medical care and to

---

[7] In early 1998 the Wilson Administration did negotiate a Tribal-State compact with the Pala Band of Mission Indians, a tribe not then engaged in class III gaming. *Hotel Employees*, 21 Cal. 4th at 597. Governor Wilson intended for this compact to serve as a statewide model and invited other tribes (including Coyote Valley) to enter a compact substantially identical. *Id.* However, most of the State's tribes (including Coyote Valley) objected to both the manner in which the compact had been negotiated and the restrictions it placed on the type and number of gaming devices, and thus refused to accept the Governor's offer. *Id.*

establish or supplement programs addressing compulsive and addictive gambling; and (3) a "Local Benefits Grant Fund," from which distributions were to be made to address the needs of the cities or counties within the boundaries of which tribal gaming facilities were located. See Cal. Gov. Code § 98004, Secs. 5.2, 5.3, 5.4. Under the terms of the model compact, the tribes" obligation to contribute to these funds was expressly conditional:

> The parties acknowledge that the operation of Tribal gaming terminals authorized under this Gaming Compact is expected to occupy a unique place in gaming within the State that is material to the ability of the Tribe and other tribal governments operating under similar compacts to achieve the economic development and other goals intended by IGRA. The Tribe therefore agrees to make the contributions to the trust funds described in Sections 5.2, 5.3, and 5.4, only for as long as it and other tribes that have entered into Gaming Compacts are not deprived of that unique opportunity.

Id. at Sec. 5.1. In other words, the tribes' obligation to contribute to these funds lasted only so long as they maintained their monopoly in the State over the operation of slot machines. Proposition 5 also included an explicit waiver of the State's sovereign immunity to suits brought against it pursuant to IGRA. See Cal. Gov. Code § 98005 ("[T]he State of California also submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith . . . .").

Proposition 5 passed by a wide margin. Shortly after its passage, however, the Hotel Employees and Restaurant Employees International Union (the "Union") and others filed

a petition for a writ of mandate in the California Supreme Court seeking to prevent the Governor from implementing Proposition 5 because, they argued, it violated Article IV, Section 19(e) of the California Constitution. *Hotel Employees*, 21 Cal. 4th at 601. Section 19(e), added to California"s Constitution in 1984, provides that the "Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey."[8]

The California Supreme Court stayed operation of Proposition 5 and ordered the State to show cause why the relief sought by the Union should not be granted. The Wilson Administration responded by filing a return supporting the Union's opposition to Proposition 5. *Hotel Employees*, 21 Cal. 4th at 591. When Governor Gray Davis took office in January 1999, however, his Administration withdrew the return of the outgoing Administration and substituted its own, which expressed neutrality as to the Union's suit. *Id.*

---

[8] Anticipating just such a challenge, Proposition 5 included the following language:

> The people of the state [ ] find that casinos of the type currently operating in Nevada and New Jersey are materially different from the tribal gaming facilities authorized under this chapter, including those in which the gaming activities under the Gaming Compact are conducted, in that the casinos in those states: (1) commonly offer their patrons a broad spectrum of house-banked games, including but not limited to house-banked card games, roulette, dice games, and slot machines that dispense coins or currency, none of which games are authorized under this chapter; and (2) are owned by private companies, individuals, or others that are not restricted on how their profits may be expended, whereas tribal governments must be the primary beneficiaries of the gaming facilities under this chapter and the Gaming Compact, and are limited to using their gaming revenues for various tribal purposes, including tribal government services and programs such as those that address reservation housing, elderly care, education, economic development, health care, and other tribal programs and needs, in conformity with federal law.

Cal. Gov. Code § 98001(c).

On August 23, 1999, the California Supreme Court held, in agreement with the Union, that the gaming rights conferred on tribes by Proposition 5 violated the California Constitution. *Id.* at 589. "Because Proposition 5, a purely statutory measure, did not amend section 19(e) or any other part of the Constitution, and because in a conflict between statutory and constitutional law the Constitution must prevail," the court invalidated the proposition in its entirety, save the final sentence of Cal. Gov. Code § 98005, containing the State"s consent to federal suits brought by California tribes pursuant to IGRA.[9] *Id.*

Before the California Supreme Court ruled in *Hotel Employees*, the new Davis Administration had sought to engage tribes in compact negotiations, despite its limited obligations under our decision in *Rumsey*. Among other things, Governor Davis was concerned about the effect an adverse decision in *Hotel Employees* could have on tribes then engaged in (and dependent on revenue from) unlawful class III gaming operations. Depending on the scope of the opinion, the decision could completely prohibit the State from entering compacts to legitimize that gaming, thus leaving these tribes vulnerable to federal prosecution.

In March 1999, Governor Davis appointed a Special Counsel for Tribal Affairs to lead the State's negotiating team, and on April 9th he met personally with tribal leaders to introduce his appointee. At that meeting, which was attended by a representative of Coyote Valley, the State's lead negotiator asked that the tribes organize themselves into one or more negotiating teams to provide structure to the compact discussions. The tribes agreed, and subsequently formed three groups: (1) the United Tribe Compact Steering Committee ("UTCSC"); (2) the Desert Six group; and (3) the Pala Tribe group. Coyote Valley joined the UTCSC

---

[9] Given the continuing validity of this statutory provision, *Seminole Tribe* does not affect our jurisdiction in this case.

negotiating group, but reserved its right to withdraw at any time.[10]

From April 9 until May 4, the State's Office of Tribal Affairs received formal requests from the tribes to enter compact negotiations. The State met for an initial round of negotiations with the Desert Six group on May 6, with the Pala Tribe group on May 7, and with the UTCSC on May 13. At the May 13 meeting, the UTCSC announced that the model compact contained in Proposition 5 would be its opening offer. The State explained that it, too, wished to stay as close to the text of Proposition 5 as possible, but identified what it believed to be a few key deficiencies in the Proposition 5 model compact. While the State expressed no interest in cutting back on either the types of games permitted under Proposition 5 or the number of gaming machines currently in operation on tribal lands, it wanted to prevent the expansion of tribal gaming beyond what if considered to be reasonable levels, something Proposition 5 itself did not do. The State also took the position that the negotiated compact should allow the State to spend any revenue-sharing dollars it received from the tribes as it saw fit, rather than earmark those dollars for specified uses as in Proposition 5's model compact.

The State also expressed a desire that any compact address casino worker's rights. While the Proposition 5 model compact included provisions addressing employee work-related injuries, disabilities, and unemployment, see Cal. Gov. Code § 98004, Sec. 10.1(f), it had no provision concerning collective bargaining rights of casino employees. The State suggested that the tribes work directly with union representatives to decide how they might meet the concerns

---

[10] According to an affidavit of the Special Counsel submitted in the district court in this case, Coyote Valley was not required to join or remain in a negotiating group, and the State never conditioned its willingness to engage in negotiations with Coyote Valley or any other tribe on such membership.

of organized labor. The UTCSC indicated that it had a meeting scheduled with union representatives the following Wednesday, but expressed its reluctance to cede tribal sovereignty to the State on labor issues. The UTCSC also expressed its belief that labor relations might be an inappropriate topic for Tribal-State compact negotiations pursuant to IGRA.

At the conclusion of the May 13 meeting, the parties agreed that the State would promptly prepare and circulate a working draft model compact in the form of a redlined version of Proposition 5 and that the parties would then meet for a second round of negotiations to discuss the draft. The State circulated its draft on May 21, and a second round of negotiations was held with the Desert Six and Pala Tribe groups on May 25, and with the UTCSC on May 26. Over the course of the next month, the State received and reviewed written responses and counter-proposals submitted by the three tribal negotiating groups.

On June 17, the UTCSC sent the State a discussion draft of its own, also as a redlined version of Proposition 5. The State did not respond immediately, and on July 22 the UTCSC sent the State a letter expressing frustration with the pace of discussions and voicing its concern that a compact might not be concluded before the announcement of the *Hotel Employees* decision. In that letter, the UTCSC again expressed its belief that labor relations, a subject included in the State's discussion draft of May 21, was not a proper topic of compact negotiations pursuant to IGRA. The letter also stated that the UTCSC had learned that the State was "exploring the concept of an enormous revenue sharing requirement," and noted that "[u]nder IGRA, this clearly would be an impermissible tax on Tribal gaming operations." According to Coyote Valley, the State intentionally stalled talks during this period so as to force the tribes to meet with union representatives.

Negotiations commenced again at the end of August. Two significant events occurred at about this time. First, the California Supreme Court announced its decision in Hotel Employees. The State already had no obligation to conclude compacts with tribes permitting slot machines and banked card games, see *Rumsey*, 64 F.3d at 1258; the decision meant it now also lacked the authority to do so. To address this problem, the Davis Administration proposed an amendment to Section 19 of Article IV of the California Constitution that would exempt tribal gaming from the prohibition on Nevada-style casinos, effectively granting tribes a constitutionally protected monopoly on most types of class III games in California. Although the voters would not have the opportunity to ratify the proposed amendment ("Proposition 1A") until March of 2000, the parties nonetheless determined to keep working to conclude a Tribal-State compact that would be conditional on that ratification.[11] Second, the United States Department of Justice announced that it planned to proceed with enforcement actions against certain California tribes engaged in uncompacted class III gaming if those tribes did not enter compacts with the State before October 13, 1999.

The State delivered a new draft compact to the tribes on August 27, 1999. A third round of negotiations then took place in Sacramento from August 30 until September 3, and again from September 6 to September 10. At a meeting

---

[11] Proposition 1A ultimately was ratified by California voters on March 7, 2000. It added the following language to Section 19 of Article IV:

> Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

Cal. Const. Art. IV, § 19(f).

conducted on August 31, attended by each of the tribal negotiating groups, the tribes expressed three primary concerns with the August 27 draft circulated by the State. First, the tribes objected to the limits placed on the number of new gaming machines they could acquire. Second, they contended that the required contributions to the compact's revenue-sharing funds were overly burdensome. Third, they expressed their continuing belief that it was inappropriate under IGRA for the State to insist on the inclusion of a labor relations provision.

The State responded by circulating a revised draft on September 7 and a final offer on September 9. The final draft included several changes from the August 27 draft, the most significant of which was an expansion of the types of games that tribes were permitted to conduct. Each of the previous drafts (indeed, even Proposition 5's model compact), had permitted only gaming devices and banked card games that paid prizes in accordance with a "players" pool prize system." By contrast, the final State proposal, in a major concession, permitted the tribes to operate real Las Vegas-style slot machines and house-banked blackjack. See K. Alexa Koenig, Gambling on Proposition 1A: The California Indian Self-Reliance Amendment, 36 U.S.F. L. REV. 1033, 1043-44 (2002) ("In exchange for a percent of tribal gaming revenue, the governor offered tribes even more than what they had sought with Proposition 5: . . . full Las Vegas-style slot machines, as well as an exclusive right to conduct class III gaming in the state.").[12]

---

[12] "In a player pool system, casinos charge a flat fee per play. For example, the house may charge a player twenty-five cents each time she places a five dollar bet, regardless of whether she wins or loses. Any money won by the player is made up of funds lost by previous players, from which the house takes nothing. By contrast, Las Vegas-style slot machines offer "house banked" games, which enable the house to collect players' losses." *Koenig*, 36 U.S.F. L. REV. at 1041 n.65.

According to Coyote Valley, the State delivered this final offer at approximately 8:00 p.m. and required that the tribes respond by 10:00 p.m. that same night if they wished to accept. A representative from Coyote Valley went to the Governor's office during this two hour interval to discuss the tribe's concerns with the proposed compact, but the State's negotiating team was inaccessible. Several tribal leaders and attorneys sought to meet with the Governor's negotiating team at this same time. The Governor's negotiating team met with one tribal employee and one tribal attorney, neither of whom represented Coyote Valley. The remaining people were escorted from the Governor's reception room.

That night, 57 tribes (including Coyote Valley) signed letters of intent to enter the compact. Only one tribe initially refused, and it signed the letter a few days later with slight modifications to the compact. That tribe was the Agua Caliente Band of Cahuilla Indians of Palm Springs ("Agua Caliente"). Frustrated with the lull in negotiations in June, July, and early August, Agua Caliente had begun a campaign to place Proposition 5 (and its model compact) back on the ballot, this time as a constitutional amendment. Agua Caliente had gathered enough signatures to qualify the initiative for the April 2000 ballot when Governor Davis made the unexpected concession offering tribes the right to operate real Las Vegas-style slot machines as well as house-banked blackjack. In response, Agua Caliente withdrew its initiative petition. Agua Caliente signed a letter of intent to enter the Davis Compact on September 14, 1999.

The core of the negotiated compact (the "Davis Compact") is that the State granted the tribes the exclusive right to conduct lucrative Las Vegas-style class III gaming, free from non-tribal competition in the State. In return, the tribes agreed to a number of restrictions and obligations concerning their gaming enterprises.[13] Specifically, the tribes

---

[13] Section 12.4 of the compact grants tribes the right to terminate the compact "in the event the exclusive right of Indian tribes to operate

agreed to three provisions that Coyote Valley contends in this suit are impermissible and whose inclusion in the ultimate compact demonstrates the bad faith of the State. These challenged provisions are: (1) the Revenue Sharing Trust Fund provision; (2) the Special Distribution Fund provision; and (3) the Labor Relations provision.[14]

The Revenue Sharing Trust Fund: The preamble to the Davis Compact recites that the "State has an interest in promoting the purposes of IGRA for all federally-recognized Indian tribes in California, whether gaming or non-gaming." In furtherance of this interest, Section 4.3.2.1 of the compact creates a Revenue Sharing Trust Fund (the "RSTF") that grants a maximum of $ 1.1 million dollars to each of the State's non-gaming tribes each year. The idea of gaming tribes sharing gaming revenue with non-gaming tribes originated in Proposition 5's "Nongaming Tribal Assistance Fund," and this idea had been incorporated into the UTCSC discussion draft of June 17. Under Section 4.3.2.2 of the Davis Compact, gaming tribes fund the RSTF by purchasing "licenses" to acquire and maintain gaming devices in excess of the number they are authorized to use under Section 4.3.1. The cost of a license is graduated: $ 900 per year per machine for the first 400 machines in excess of 350; $ 1950 per year per machine for the next 500 machines in excess of 750; and $ 4350 per year per machine for the next 750 machines in excess of 1250. In no event can a tribe acquire licenses for more than 2000 machines. In addition, for each license tribes are required to pay into the RSTF a one-time fee of $ 1250. According to the State, the purpose of the progressive fee structure is to ensure that tribes with the largest, and therefore

---

Gaming Devices in California is abrogated by the enactment, amendment, or repeal of a state statute or constitutional provision" or by a judicial decision.

[14] The complete compact may be viewed on the website of the California Gambling Control Commission. See *http://www.cgcc.ca.gov/tsc.pdf*. We summarize here only those provisions relevant to Coyote Valley's appeal.

most lucrative, gaming establishments will pay a relatively greater share in supporting other California tribes in return for the right to operate additional licensed machines. The progressive fee structure also assists in achieving the State's objective of limiting the expansion of gaming facilities.

The Special Distribution Fund: The preamble to the compact also recites that the

> exclusive rights that Indian tribes in California [ ] will enjoy under this Compact create a unique opportunity for the Tribe to operate its Gaming Facility in an economic environment free of competition from the Class III gaming referred to in Section 4.0 of this Compact on non-Indian lands in California. The parties are mindful that this unique environment is of great economic value to the Tribe and the fact that income from Gaming Devices represents a substantial portion of the tribes' gaming revenues. In consideration for the exclusive rights enjoyed by the tribes, and in further consideration for the State's willingness to enter into this Compact, the tribes have agreed to provide the State, on a sovereign-to-sovereign basis, a portion of its revenue from Gaming Devices.

Pursuant to this part of the preamble, the compact provides in Section 5 for the creation of a Special Distribution Fund ("SDF"), to be financed out of the tribes' net win from the operation of their gaming devices. As provided in Section 5.1, the amount that goes to the fund is to be calculated as 0% of the net win for the first 200 terminals, 7% of the net win for the next 300 terminals, 10% of the net win for the next 500 terminals, and 13% of the net win for any additional terminals above 1000. Section 5.2 provides that the revenue deposited in the SDF is available for appropriation by the Legislature for the following specified purposes: (a) grants for programs designed to address gambling addiction; (b) grants for the support of state and local government agencies

impacted by tribal gaming; (c) compensation for regulatory costs incurred by the State Gaming Agency and the state Department of Justice in connection with the implementation and administration of the compact; (d) payment of shortfalls that may occur in the RSTF; and (e) "any other purposes specified by the legislature." The compact states that it "is the intent of the parties that Compact Tribes will be consulted in the process of identifying purposes for grants made to local governments."

The Labor Relations Provision: Section 10.7 of the compact provides that it

> shall be null and void if, on or before October 13, 1999, the Tribe has not provided an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

Between late July and September 1999, California tribes conducted independent negotiations with labor representatives and agreed on a model Tribal Labor Relations Ordinance (the "TLRO") that meets the requirements of Section 10.7. The TLRO provides limited organizational rights to workers at tribal gaming establishments and related facilities that employ 250 or more employees.[15] These rights include union access to eligible employees in break rooms and locker rooms during non-work time, as well as the right to engage in collective bargaining if the union becomes the

---

[15] The TLRO defines a "related facility" as a facility "for which the only significant purpose is to facilitate patronage of the class III gaming operations."

exclusive collective bargaining representative by winning an election. The TLRO also contains several provisions that protect tribal interests. For example, it guarantees tribal gaming establishments the right to grant employment preferences to Native Americans, places strict limits upon a union's right to strike, and completely prohibits picketing on Indian lands.

Coyote Valley initially signed a letter of intent stating that it accepted the Davis Compact, including the three just-described provisions it now challenges. However, when the time came actually to execute the compact, Coyote Valley refused. In a letter dated October 13, 1999, Coyote Valley informed the State that before it would agree to sign, it needed to meet with State representatives to discuss "various issues and concerns" regarding certain provisions in the Davis Compact. The State replied in a letter dated October 18, 1999. The State did not respond to the tribe's request for a meeting, but instead emphasized the numerous negotiating opportunities the tribe had had, and highlighted the fact that the tribe had already signed a letter of intent to enter the Davis Compact. The tribe responded by letter on October 20, again requesting a meeting with the State on an individual tribal basis to discuss its concerns. The State replied on October 25, asking that Coyote Valley submit in writing any proposed changes or modifications to the Davis Compact for consideration.

Coyote Valley submitted its proposed changes to the State on November 12. In addition to several other modifications, the tribe sought: (1) the complete elimination of the RSTF provision; (2) a limitation of its obligation to contribute to the SDF to only those amounts necessary to reimburse the costs to the State of regulating activities at Coyote Valley's gaming facility; and (3) the complete elimination of the Labor Relations provision. In an accompanying cover letter, Coyote Valley indicated that it was only proposing changes "to the provisions of the Compact that it views as irreconcilable with [ ] IGRA." The

tribe also indicated that it was putting into place its own "Tribal Employees Rights Ordinance" (rather than the TLRO) to address the rights of its class III gaming employees, and that it would forward the document to the State shortly.

The State replied on December 8, rejecting all of Coyote Valley's proposed modifications. The State specifically indicated that the tribe must adopt a labor ordinance identical to the TLRO in order for that ordinance to be acceptable to the State under Section 10.7 of the Davis Compact. The State indicated that it would be willing to meet with the tribe's representative to discuss the State's position and to allow the tribe an opportunity to discuss its position. No such meeting ever occurred.

Section 11.1(c) of the Davis Compact provides that it will not take effect "unless and until" Proposition 1A is approved by California voters. On September 10, 1999, the State Legislature passed Proposition 1A; the voters of California ratified it on March 7, 2000. On May 5, 2000, the United States Secretary of the Interior approved, pursuant to 25 U.S.C. § 2710(d)(8)(A), the Tribal-State compacts entered into between the State and 60 tribes. See 65 Fed. Reg. 31189 (May 16, 2000). Because Coyote Valley had refused to sign the compact, it was not among those tribes.

Coyote Valley had earlier filed a complaint in the District Court for the Northern District of California alleging a lack of good faith negotiation by the Wilson Administration. In December 1999, after the State rejected the tribe's proposed modifications to the Davis Compact, Coyote Valley amended its complaint to allege a lack of good faith negotiation by both the Wilson and Davis Administrations. The tribe moved for an order requiring the State to negotiate in good faith pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii). The District Court denied the motion on August 22, 2000, and again on reconsideration on June 15, 2001. The tribe timely appealed.

We review mixed questions of law and fact de novo. *Diamond* v. *City of Taft*, 215 F.3d 1052, 1055 (9th Cir. 2000). A mixed question of law and fact exists where the relevant facts are undisputed and the question is whether those facts satisfy the applicable legal rule. *Id.* Very few of the relevant facts in this case, as set forth in the preceding narrative, are in dispute. To the extent that there is a difference in the competing versions of the facts, we accept, for purposes of this appeal, Coyote Valley's version. The issue before us is whether, on these facts, the State has satisfied IGRA's good faith requirement. On this legal issue, we review the district court's decision de novo.

II. Discussion

A

[1] IGRA provides that, in determining whether a State has negotiated in good faith, a court:

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

25 U.S.C. § 2710(d)(7)(B)(iii). "[U]pon the introduction of evidence by an Indian tribe that . . . the State . . . did not respond to [the request of the Indian tribe to negotiate a compact] in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(7)(B)(ii). See S. Rep. No. 100-446, at 15 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3085 ("The Committee notes that it is States not tribes, that have crucial information in their possession that will prove or disprove tribal allegations of failure to act in good faith. Furthermore, the bill provides that the court, in making its [good faith] determination, may consider any of the number of issues

listed in this section, including the State's public interest and other claims. The Committee recognizes that this may include issues of a very general nature and, and course [sic], trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes.").

[2] Section 2710(d)(3)(C) of IGRA provides that any Tribal-State compact negotiated under § 2710(d)(3)(A) may include provisions relating to:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of [gaming] activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in such amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C). Section 2710(d)(4) provides that except for any assessments that may be agreed to under paragraph (3)(C)(iii), "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other

assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity."

IGRA's legislative history gives guidance to courts deciding whether a party has negotiated in good faith. Because of the scant authority interpreting or applying IGRA's good faith requirement, we set forth a somewhat lengthy excerpt from the Senate Committee Report:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States [sic]. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens. It is the Committee's intent that the compact requirement for class III gaming not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.
>
> . . .

> The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc. Section [ ](d)(3)(C) describes the issues that may be the subject of negotiations between a tribe and a State in reaching a compact. The Committee recognizes that subparts of each of the broad areas may be more inclusive. For example, licensing issues under clause vi may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility. A compact may allocate most or all of the jurisdictional responsibility to the tribe, to the State or to any variation in between. The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands.
>
> . . .
>
> Finally, the bill allows States to consider negative impacts on existing gaming activities. That is not to say that the bill would allow States to reject Indian gaming on the mere showing that Indian gaming will compete with non-Indian games. Rather, the States must show that economic consequences will be severe and that they will clearly outweigh positive economic consequences.

S. REP. 100-446, at 13-14 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3083-84.

B

Coyote Valley makes two kinds of arguments. The first is procedural. The tribe contends that the State's conduct during negotiations -- specifically its dilatory tactics over the course of a seven-year period -- constitutes bad faith. The second is substantive. The tribe contends that the RSTF, SDF, and Labor Relations provisions of the Davis Compact fall outside the list of appropriate topics for Tribal-State

compacts set forth in 25 U.S.C. § 2710(d)(3)(C), and that the State therefore acted with "per se bad faith" when it demanded that these provisions be included in any compact it entered with the tribe. The tribe also contends that the State's insistence on the RSTF and SDF provisions constitutes a "demand by the State for direct taxation of the Indian tribe," giving rise to a statutory presumption that the State has not negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii)(II).

1. Procedural Objections

[3] We cannot conclude from the history of negotiations recounted above that, as a procedural matter, the State has refused to negotiate in good faith. It is clear that the Wilson Administration was not sympathetic to tribal gaming and was exceedingly reluctant to reach any agreement that the tribes considered acceptable. But the gravamen of Coyote Valley's amended complaint is that the Davis Administration, rather than the Wilson Administration, has refused to negotiate in good faith; and it is against the Davis Administration that Coyote Valley seeks injunctive relief.

[4] On the record before us, it appears that the Davis Administration has actively negotiated with Indians tribes, including Coyote Valley, concerning class III gaming, and that it has negotiated despite the absence of any legal obligation to do so. Until Proposition 1A was ratified in March of 2000, the State had no obligation to negotiate with Coyote Valley over the types of class III games covered in the Davis Compact. See *Rumsey*, 64 F.3d 1258 (holding that the phrase "such gaming" in IGRA does not include all class III gaming). Moreover, at the time Coyote Valley filed its amended complaint with the district court, alleging bad faith by the Wilson and Davis Administrations, the State remained willing to meet with the tribe for further discussions. To the extent that Coyote Valley may have a valid objection to negotiations by the Davis Administration, it is not an objection to the timing and procedures of those negotiations. It is, rather, an objection to the substance of the three

provisions of the Davis Compact to which Coyote Valley specifically objects.

2. Substantive Objections

We do not believe that the three challenged provisions are categorically forbidden by the terms of IGRA. Nor do we believe on the facts of this case that the State's insistence on their inclusion in the compact demonstrates a lack of good faith.

a. The Revenue Sharing Trust Fund

Coyote Valley first argues that the Revenue Sharing Trust Fund, which requires that gaming tribes share gaming revenues with non-gaming tribes, is impermissible under IGRA. Coyote Valley takes the position that except for "assessment[s] by the State [ ] in such amounts as are necessary to defray the costs of regulating" tribal gaming activities, 25 U.S.C. § 2710(d)(3)(C)(iii), a provision in a Tribal-State compact requiring that the tribe pay a "tax, fee, charge, or other assessment" to the State or a third party is categorically prohibited, *id.* § 2710(d)(4). The tribe relies on § 2710(d)(4) and § 2710(d)(7)(B)(iii)(II), and emphasizes Congress's concern that States would use the negotiation process as a means of extracting forbidden taxes from tribes. See *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 458, 132 L. Ed. 2d 400, 115 S. Ct. 2214 (1995) (explaining that absent express Congressional permission, a State is without power to tax reservation lands and reservation Indians). Because the RSTF provision requires payments from compacting tribes that go beyond amounts necessary to defray the costs incurred by the State in regulating class III gaming, Coyote Valley contends that the provision cannot properly be included in a Tribal-State compact.[16] By insisting

[16] Coyote Valley calculates that the one-time license fees required by the RSTF would cost it $2,020,000 and that the annual license fees would cost it an additional $4,597,500. These calculations assume that the tribe would operate the maximum number of machines allowable under the Davis Compact. The State does not agree that the tribe would necessarily

that this forbidden provision be included in the compact, the tribe argues, the State failed to negotiate in good faith.

[5] As explained more fully below, we hold that § 2710(d)(3)(C)(vii) authorizes the RSTF provision and that the State did not lack good faith when it insisted that Coyote Valley adopt it as a precondition to entering a Tribal-State compact. In so holding, we do not interpret IGRA as "conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge or other assessment upon an Indian tribe." 25 U.S.C. § 2710(d)(4) (emphasis added). Given that the State offered meaningful concessions in return for its demands, it did not "impose" the RSTF within the meaning of § 2710(d)(4). To the extent that the State's insistence on the RSTF provision constitutes a "demand by the State for direct taxation of the Indian tribe," *id.* § 2710(d)(7)(B)(iii)(II), which we do not decide, the State has successfully rebutted any inference of bad faith created thereby.

[6] Section 2710(d)(3)(C)(vii) explicitly provides that a "Tribal-State compact . . . may include provisions relating to . . . subjects that are directly related to the operation of gaming activities." It is clear that the RSTF provision falls within the scope of paragraph (3)(C)(vii). Congress sought through IGRA to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." *Id.* § 2702(1). The RSTF provision advances this Congressional goal by creating a mechanism whereby all of California's tribes -- not just those fortunate enough to have land located in populous or accessible areas -- can benefit from class III gaming activities in the State. See *Washburn*, 1 WYO. L. REV. at 435 ("Not surprisingly, the most successful gaming operations are located in close proximity to large urban areas. A handful of tribes blessed by geography and demographics

---

operate that number of machines. Given the nature of our holding, it is unnecessary to resolve that dispute.

have been fabulously successful. The poorest of tribes have remained the poorest communities in the United States."). Moreover, the provision accomplishes this in a manner directly related to the operation of gaming activities.

Coyote Valley asks us to read § 2710(d)(3)(C)(vii) narrowly and to hold that it does not encompass a provision like the RSTF. The tribe invokes the Senate Committee's statement that we should "interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests." S. REP. NO. 100-446, at 15 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3085. Even with the assistance of this language from the legislative history, we do not agree with Coyote Valley's reading of paragraph (3)(C)(vii). First, we believe that the paragraph is not ambiguous and that the RSTF provision clearly falls within its scope. Second, we do not believe that Coyote Valley's preferred reading of paragraph (3)(C)(vii) as forbidding revenue-sharing with non-gaming tribes is the interpretation "most favorable to tribal interests." See *Koenig*, 36 U.S.F. L. REV. at 1035 ("For tribes that have not elected to take part in gaming, or whose lands are too far from urban centers to make gaming feasible, revenue sharing agreements have reduced dependence on welfare, and produced critical income to ensure basic provisions for tribal members."). Third, it is clear from the legislative history that by limiting the proper topics for compact negotiations to those that bear a direct relationship to the operation of gaming activities, Congress intended to prevent compacts from being used as subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming. See S. REP. NO. 100-446, at 14 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3084. In advocating the inclusion of the RSTF, the State has not sought to engage in such a subterfuge.

We also reject Coyote Valley's argument that, regardless of whether the RSTF provision would otherwise fall within § 2710(d)(3)(C)(vii), it cannot in good faith be

included in a Tribal-State compact because it violates § 2710(d)(4). That paragraph provides:

> Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

25 U.S.C. § 2710(d)(4). The plain language of this paragraph forbids us from construing anything in § 2710 as conferring upon the State an "authority to impose" taxes, fees, charges, or other assessments on Indian tribes. See also S. REP. NO. 100-446, at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3088 (stating that § 2710(d)(4) "[c]larifies that [IGRA] does not confer on any state any authority to tax or to otherwise assess any Indian Tribe"). However, our interpretation of paragraph (3)(C)(vii) as authorizing the RSTF provision does not run afoul of this prohibition.

We do not hold that the State could have, without offering anything in return, taken the position that it would conclude a Tribal-State compact with Coyote Valley only if the tribe agreed to pay into the RSTF. Where, as here, however, a State offers meaningful concessions in return for fee demands, it does not exercise "authority to impose" anything. Instead, it exercises it authority to negotiate, which IGRA clearly permits. See S. REP. NO. 100-446, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3083 (describing the compacting process as a "viable mechanism for setting various matters between two equal sovereigns"). Depending on the nature of both the fees demanded and the

concessions offered in return, such demands might, of course, amount to an attempt to "impose" a fee, and therefore amount to bad faith on the part of a State. If, however, offered concessions by a State are real, § 2710(d)(4) does not categorically prohibit fee demands. Instead, courts should consider the totality of that State's actions when engaging in the fact-specific good-faith inquiry IGRA generally requires. See 25 U.S.C. § 2710(d)(7)(B)(iii).

In this case, Coyote Valley cannot seriously contend that the State offered no real concessions in return for its insistence on the RSTF provision. Under our holding in *Rumsey*, the State had no obligation to enter any negotiations at all with Coyote Valley concerning most forms of class III gaming. Nor did the State have any obligation to amend its constitution to grant a monopoly to tribal gaming establishments or to offer tribes the right to operate Las Vegas-style slot machines and house-banked blackjack. As part of its negotiations with the tribes, the State offered to do both things. We therefore reject the tribe's challenge to the RSTF premised on § 2710(d)(4).

Finally, Coyote Valley relies on § 2710(d)(7)(B)(iii)(II), which provides that courts "shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." We need not decide whether the fee structure used to fund the RSTF constitutes a "direct tax"; nor need we determine whether the State "demanded" it. Even if we assume that both are true, we would still find that the State did not negotiate in bad faith by taking the position that any compact it would enter with Coyote Valley must include the RSTF provision. Paragraph (7)(B)(iii)(II) provides only that a court "shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." *Id.* § 2710(d)(7)(B)(iii)(II) (emphasis added). Coyote Valley would have us read "evidence" to mean "conclusive proof." This we cannot do.

Not only does the plain language of the paragraph forbid such a construction, but IGRA's legislative history also makes clear that the good faith inquiry is nuanced and fact-specific, and is not amenable to bright-line rules. See S. REP. NO. 100-446, at 14 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3084 ("The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc."). See also 25 U.S.C. § 2710(d)(7)(B)(ii).

On the facts of this case, we do not find that the State's demands regarding the RSTF provision amount to bad faith. That provision does not put tribal money into the pocket of the State. Rather, it redistributes gaming profits to other Indian tribes. The idea of gaming tribes sharing revenue with non-gaming tribes traces its origins not to a State-initiated proposal, but rather to tribe-drafted and tribe-sponsored Proposition 5. Moreover, the UTCSC, of which Coyote Valley was a member, suggested in its discussion draft of June 17 that just such a provision be included in the Davis Compact. Every other compacting tribe in California has agreed to the provision.

[7] Given that the State offered significant concessions to tribes during the course of negotiations in return for the RSTF provision, that the provision originated in proposals by the tribes and now has strong support among the tribes, and that Coyote Valley was not excluded from the negotiations that shaped the RSTF provision, we hold that the State did not act in bad faith by refusing to enter a compact with Coyote Valley that did not include this provision.

b. The Special Distribution Fund

Unlike contributions to the RSTF, money that goes into the Special Distribution Fund does go into the pocket of the State. But it does not go into just any pocket. Although at the outset of compact negotiations with the UTCSC the State sought unrestricted access to a percentage of the tribes" net win from gaming devices, the SDF provision ultimately

incorporated into the Davis Compact is much more restrictive. It provides that money from the SDF may be appropriated by the Legislature for only the following purposes:

> (a) grants for programs designed to address gambling addiction;
>
> (b) grants for the support of state and local government agencies impacted by tribal gaming;
>
> (c) compensation for regulatory costs incurred by the State Gaming Agency and the state Department of Justice in connection with the implementation and administration of the compact;
>
> (d) payment of shortfalls that may occur in the RSTF; and
>
> (e) any other purposes specified by the legislature.

The district court interpreted subsection (e) under the ejusdem generis principle to be "limited to purposes that, like the first four enumerated purposes, are directly related to gaming." (Emphasis added.) See *United States* v. *Lacy*, 119 F.3d 742, 748 (9th Cir. 1997) ("[A] general term following more specific terms means that the things embraced in the general term are of the same kind as those denoted by the specific terms." (internal quotation marks omitted)). The State does not contest that construction on appeal, and we adopt it here.

[8] Coyote Valley raises objections to the SDF provision similar to those it raised against the RSTF provision. Specifically, it argues that the SDF provision both falls outside the proper scope for compact negotiations set forth in § 2710(d)(3)(C) and constitutes a direct tax within the meaning of § 2710(d)(7)(B)(iii)(II). We first consider whether a requirement that tribes fund any or all of the items listed in the SDF provision falls within the permissible scope of a Tribal-State compact pursuant to § 2710(d)(3)(C). We can quickly approve the funding specified in subsection (c) of the SDF provision ("compensation for regulatory costs incurred by the State Gaming Agency and the state

Department of Justice in connection with the implementation and administration of the compact"). Pursuant to 25 U.S.C. § 2710(d)(3)(C)(iii), assessments on tribes designed to cover the State's costs of regulating Indian gaming are clearly appropriate, and by demanding such assessments the State does not act in bad faith. We can likewise easily dispose of the tribe's challenge to subsection (d)("payment of shortfalls that may occur in the [RSTF]"); its inclusion in the Davis Compact does not demonstrate a lack of good faith for the same reasons that the inclusion of the RSTF provision did not demonstrate a lack of good faith. See *supra*. That leaves subsections (a)("grants [ ] for programs designed to address gambling addiction"), (b)("grants [ ] for the support of state and local government agencies impacted by tribal [ ] gaming"), and (e)("any other purposes [directly related to gaming] specified by the legislature"). Although these provisions do not fit comfortably within paragraph (3)(C)(iii), it cannot seriously be doubted that each are "directly related to the operation of gaming activities" and are thus permissible under paragraph (3)(C)(vii). Coyote Valley argues that to interpret § 2710(d)(3)(C)(vii) as encompassing these provisions violates § 2710(d)(4), but we reject this argument for the reasons stated in the previous section.

[9] We next determine whether the State acted in bad faith by insisting on the inclusion of the SDF provision in the Davis Compact. Even if the State's insistence on this provision was indeed a "demand" for a "direct tax" (which we do not decide), we hold that circumstances exist in this case to justify the State's conduct. As explained above, a State's demand for direct taxation of an Indian tribe constitutes only "evidence" of bad faith that courts "shall consider." 25 U.S.C. § 2710(d)(7)(B)(iii)(II). This evidence is not conclusive, and on the facts of this case the State's demands do not establish bad faith. See S. REP. NO. 100-446, at 14 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3084 (explaining that, depending upon the "previous relationship of the tribe and State," the "terms of each compact may vary extensively"). As noted

above, the terms of the compact restrict what the State can do with the money it receives from the tribes pursuant to the SDF provision, and all of the purposes to which such money can be put are directly related to tribal gaming.[17] While the contributions tribes must make to the SDF are significant, the tribes receive in exchange an exclusive right to conduct class III gaming in the most populous State in the country. We do not find it inimical to the purpose or design of IGRA for the State, under these circumstances, to ask for a reasonable share of tribal gaming revenues for the specific purposes identified in the SDF provision.

Congress did not intend to allow States to invoke their economic interests "as a justification . . . for excluding Indian tribes from" class III gaming; nor did Congress intend to permit States to use the compact requirement "as a justification . . . for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes." *Id.* at 13, 3083. By the same token, however, Congress also did not intend to require that States ignore their economic interests when engaged in compact negotiations. See *id.* at 2, 3071 ("An [ ] objective inherent in any government regulatory scheme is to achieve a fair balancing of competitive economic interests."). Indeed, § 2710(d)(7)(B)(iii)(I) expressly provides that we may take into account the "financial integrity" of the State and "adverse economic impacts on [the State's] existing gaming activities" when deciding whether the State has acted in bad faith, and

---

[17] The SDF provision in the Davis Compact differs in this respect from the revenue-sharing provisions found in Tribal-State compacts entered into by the States of Connecticut, New Mexico, and New York, for example. In these States, revenue derived from tribal gaming goes into the States' general funds. See Gatsby Contreras, Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?, 5 J. GENDER RACE & JUST. 487, 495-501 (2002). The legality of such compacts is not before us, and we intimate no view on the question.

IGRA's legislative history explains that a "State's governmental interests with respect to class III gaming on Indian lands include . . . its economic interest in raising revenue for its citizens." S. REP. NO. 100-446, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3083. Here the State did not use compact negotiations to protect "other State-licensed gaming enterprises from free market competition with Indian tribes." *Id.* at 13, 3083. Instead, the State proposed a constitutional amendment protecting tribal gaming enterprises from free market competition by the State, even though it had no obligation to do so.

[10] We conclude that for the State to demand that Coyote Valley, in exchange for these exclusive gaming rights, accede to the limited revenue sharing required in the SDF provision does not constitute bad faith. The tribes who drafted and placed Proposition 5 on the ballot thought such an exchange was fair. The Proposition 5 model compact required that tribes, in exchange for exclusive rights to conduct certain class III games in the State, contribute funds to counties in California to supplement emergency medical care and programs on addictive gambling and to address the needs of the cities or counties within the boundaries of which tribal gaming facilities are located. See Cal. Gov. Code § 98004, Secs. 5.3 & 5.4. The former Secretary of the Interior also appears to believe such an exchange is fair, given that he approved the Davis Compact in May 2000. See 65 Fed. Reg. 31189(May 16, 2000). See also 25 U.S.C. § 2710(d)(8)(B)(providing that the Secretary may disapprove compacts that violate IGRA or the trust obligations of the United States to Indians).

c. The Labor Relations Provision

Finally, Coyote Valley contends that the Labor Relations provision is improper, arguing that labor relations are too far afield from tribal gaming to be an appropriate topic for Tribal-State compact negotiations. The State counters that because thousands of its citizens are employed at tribal

casinos, it is proper for the State to insist on some minimal level of protection for those workers as a precondition to entering a Tribal-State compact.[18] We hold that the provision falls within the scope of § 2710(d)(3)(C)(vii) and that, under the circumstances of this case, the State did not act in bad faith in requiring that Coyote Valley adopt it or forgo entering a compact.

[11] During the negotiation of the Davis Compact the State did not demand that tribes adopt a specific set of legal rules governing general employment practices on tribal lands. Instead, it demanded that tribes meet with labor unions to negotiate independently a labor ordinance addressing only organizational and representational rights and applicable only to employees at tribal casinos and related facilities. This demand became Section 10.7 of the Davis Compact:

> Notwithstanding any other provision of this Compact, this Compact shall be null and void if, on or before October 13, 1999, the Tribe has not provided an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

We hold that this provision is "directly related to the operation of gaming activities" and thus permissible pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii). Without the "operation of gaming activities," the jobs this provision covers would not

---

[18] According to statistics compiled by the National Indian Gaming Association, seventy-five percent of employees at tribal gaming establishments in the United States are non-Indians. See *http://www.indiangaming.org/ library/index.html.*

exist; nor, conversely, could Indian gaming activities operate without someone performing these jobs. We therefore reject Coyote Valley's argument that IGRA categorically forbids its inclusion in the Davis Compact.

[12] We also reject Coyote Valley's argument that the State acted in bad faith when it demanded that the Labor Relations provision be included in the compact. We may consider the public interest of the State when deciding whether it has negotiated in good faith, and a State's concern for the rights of its citizens employed at tribal gaming establishments is clearly a matter within the scope of that interest. 25 U.S.C. § 2710(d)(7)(B)(iii)(I); see also S. REP. NO. 100-446, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3083 ("A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests . . . ."); Cal. Labor Code § 923 (declaring it the public policy of the State "that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment"). Given that the State offered numerous concessions to the tribes in return for the Labor Relations provision (including the right to exclusive operation of Las Vegas-style class III gaming in California), it did not constitute bad faith for the State to insist that this interest be addressed in the limited way provided in the provision.

Finally, Coyote Valley argues that even if the Labor Relations provision itself does not violate IGRA or demonstrate the State's bad faith, the State's insistence that only the specific later-negotiated Tribal Labor Relations Ordinance will satisfy that provision does show bad faith. Although this is a closer question, we continue to disagree with the tribe. The TLRO provides only modest organizing rights to tribal gaming employees and contains several provisions protective of tribal sovereignty. Further, the UTCSC, of which Coyote Valley was a member, met with

union representatives and participated in the shaping of the TLRO. Finally, all compacting tribes in California have adopted it. Under these circumstances, and in light of the concessions granted by the State to the tribes, we hold that the State did not act in bad faith by requiring that Coyote Valley do the same.

III. Conclusion

For the foregoing reasons, the district court's order denying Coyote Valley's motion is AFFIRMED.

IN RE INDIAN GAMING RELATED CASES; COYOTE VALLEY BAND OF POMO INDIANS, Plaintiffs, v. THE STATE OF CALIFORNIA, Defendant.

No. C 97-04693 CW, This document relates to: No. C 98-01806 CW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

June 15, 2001, Decided
June 15, 2001, Filed

COUNSEL: For SANTA ROSA RANCHERIA TACHI TRIBE, Plaintiff (97-CV-4693): John M. Peebles, Michelle L. LeBeau, Monteau & Peebles LLP, Sacramento, CA.

For COYOTE VALLEY BAND OF POMO INDIANS, plaintiff (98-CV-1806): Eduardo G. Roy, Arter & Hadden LLP, San Francisco, CA.

For CALIFORNIA, STATE OF, defendant (97-CV-4693, 98-CV-1806): Sara J. Drake, Attorney General's Office, Sacramento, CA.

For CALIFORNIA, STATE OF, defendant (97-CV-4693): Peter H. Kaufman, State Attorney General's Office, San Diego, CA.

For STATE OF CALIFORNIA, defendant (97-CV-4693): Kenneth R. Williams, Attorney General's Office, Sacramento, CA.

AGUA CALIENTE BAND OF CAHUILLA INDANS, Amicus Curiae (97-CV-4693): Ezra Hendon, Crosby Heafey Roach & May, Oakland, CA.

AGUA CALIENTE BAND OF CAHUILLA INDANS, Amicus Curiae (97-CV-4693): Bernard P Simons, Crosby Heafey Roach & May, Los Angeles, CA.

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Amicus Curiae (97-CV-4693, 98-CV-1806): Richard G. McCracken, J. Thomas Bowen, Elizabeth A. Lawrence, Davis Cowell & Bowe, San Francisco, CA.

BARONA BAND OF MISSION INDIANS, Amicus Curiae (97-CV-4693, 98-CV-1806): Art Bunce, Law Office of Art Bunce, Escondido, CA.

For CALIFORNIA, STATE OF, Counter-claimant (97-CV-4693): Peter H. Kaufman, State Attorney General's Office, San Diego, CA.

For SANTA ROSA RANCHERIA TACHI TRIBE, Counter-defendant (97-CV-4693): John M. Peebles, Michelle L. LeBeau, Monteau & Peebles LLP, Sacramento, CA.

For SYCUAN BAND OF MISSION INDIANS, Counter-defendant (97-CV-4693): George Forman, Forman & Prochaska, San Rafael, CA.

JUDGES: CLAUDIA WILKEN, United States District Judge.

OPINION

AMENDED ORDER DENYING COYOTE VALLEY'S MOTION FOR AN ORDER PURSUANT TO 25 U.S.C. §§ 2710(d)(7)(B)(iii) and (iv)

This complaint was filed pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. Plaintiff Coyote Valley Band of Pomo Indians (Coyote Valley) moves for an order requiring Defendant State of California to negotiate with it pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv). The State opposes the motion. A hearing on the motion was held on February 25, 2000. Having considered all of the papers filed by the parties and oral argument on the motion, the Court denied the motion. This

Amended Order supersedes the order previously filed on August 22, 2000.

BACKGROUND

The State and many Indian tribes have been negotiating for several years over the tribes' right to conduct gaming operations in the State. The negotiations have spawned numerous lawsuits, including many filed in this district. In October, 1999, the State and most of the tribes signed gaming compacts. Coyote Valley did not sign a compact. The relevant details of the negotiations between Coyote Valley and the State are discussed as necessary below.

DISCUSSION

I. Legal Framework

In enacting IGRA in 1988, Congress created a statutory framework for the operation and regulation of gaming by Indian tribes. See 25 U.S.C. § 2702. IGRA provides that Indian tribes may conduct certain gaming activities only if authorized pursuant to a valid compact between the tribe and the State in which the gaming activities are located. See *id.* § 2710(d)(1)(C). If an Indian tribe requests that a State negotiate over gaming activities that are permitted within that State, the State is required to negotiate in good faith toward the formation of a compact that governs the proposed gaming activities. See *id.* § 2710(d)(3)(A); *Rumsey Indian Rancheria of Wintun Indians* v. *Wilson*, 64 F.3d 1250, 1256-58 (9th Cir. 1994). Tribes may bring suit in federal court against a State that fails to negotiate in good faith, in order to compel performance of that duty, see 25 U.S.C. § 2710(d)(7), but only if the State consents to such suit. See *Seminole Tribe* v. *Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996). The State of California has consented to such suits. See Cal Gov't Code § 98005; *Hotel Employees & Restaurant Employees Int'l Union* v. *Davis*, 21 Cal. 4th 585, 614-15, 981 P.2d 990 (1999).

IGRA defines three classes of gaming on Indian lands, with a different regulatory scheme for each class. Class III

gaming is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). Class III gaming includes, among other things, slot machines, casino games, banking card games, dog racing and lotteries. Class III gaming is lawful only where it is (1) authorized by an appropriate tribal ordinance or resolution; (2) located in a State that permits such gaming for any purpose by any person, organization or entity; and (3) conducted pursuant to an appropriate tribal-State compact. See *id.* § 2710(d)(1).

IGRA prescribes the process by which a State and an Indian tribe are to negotiate a gaming compact:

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

Id. § 2710(d)(3)(A). IGRA enumerates several types of provisions that may be addressed in gaming compacts. See *id.* § 2710(d)(3)(C).

If a State fails to negotiate in good faith, the Indian tribe may, after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations, initiate a cause of action in a federal district court. See *id.* § 2710(d)(7)(A)(i). In such an action, the tribe must first show that no tribal-State compact has been entered into and that the State failed to respond in good faith to the tribe's request to negotiate. See *id.* § 2710(d)(7)(B)(ii). Assuming the tribe makes this prima facie showing, the burden then shifts to the State to prove that it did in fact negotiate in good faith. See *id.*[19] If the district court

---

[19] Specifically, IGRA provides:

concludes that the State failed to negotiate in good faith, it "shall order the State and Indian Tribe to conclude such a compact within a 60-day period." *Id.* § 2710(d)(7)(B)(iii). If no compact is entered into within the next sixty days, the Indian tribe and the State must then each submit to a court-appointed mediator a proposed compact that represents their last best offer. See *id.* § 2710(d)(7)(B)(iv). The mediator chooses the proposed compact that "best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." See *id.* If, within the next sixty days, the State does not consent to the compact selected by the mediator, the mediator notifies the Secretary of the Interior, who then prescribes the procedures under which class III gaming may be conducted. See *id.* § 2710(d)(7)(B)(vii).

II. Issues Presented

Coyote Valley argues that the State did not negotiate in good faith. Coyote Valley's arguments can be divided into procedural and substantive objections to the State's conduct. Procedurally, Coyote Valley argues that the State, particularly

---

> (i) An Indian tribe may initiate a cause of action [to compel the State to negotiate in good-faith] only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).
>
> (ii) In any action [by an Indian tribe to compel the State to negotiate in good faith], upon the introduction of evidence by an Indian tribe that--
>
> (I) a Tribal-State compact has not been entered into under paragraph (3), and
>
> (II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

Id. § 2710(d)(7)(B).

under the Wilson administration but also under the current Davis administration, unreasonably delayed the initiation of negotiations, and repeatedly refused timely to meet with tribal representatives. Coyote Valley further argues that the State made its offers contingent on nearly immediate acceptance, which exerted a coercive force on the tribes. According to Coyote Valley, the State also took advantage of threats of forfeiture actions against the tribes by the United States Attorney. Finally, Coyote Valley argues that the State made its offer contingent upon the Agua Caliente Tribe ceasing its efforts to place on the March, 2000 ballot an Indian gaming initiative that would have competed with the State-sponsored gaming initiative. Substantively, Coyote Valley argues that the State refuses to enter into any compact with a tribe unless the tribe accepts State taxation on gaming revenues and enacts a specific tribal labor relations ordinance.

III. Procedural Issues

Any delays in the negotiations do not constitute bad faith. First, the Court accords the arguments concerning the Wilson administration little weight. Although IGRA does not specify the time period that should be evaluated in determining whether a State negotiated in good faith, common sense dictates that a State that has, in the recent past, negotiated in good faith should not be compelled to submit to the procedures set forth in 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv) based on its conduct in the more distant past. With regard to the State's negotiations under the Davis administration, the record reflects that both parties at times were less than diligent in responding to the other's correspondence and requests. Any delays that may have been caused by the State do not rise to the level of bad faith.

The deadline imposed by the State for accepting its offer presents a closer question, but also does not evidence bad faith. The parties were operating under time pressures exerted by a number of forces, including the impending end of a State legislative session. While it might have been better had the

State made its offer sooner, and provided the tribes with a longer period of time in which to consider the offer, it was under no obligation to do so.

Coyote Valley's objections to the demands that the State made of the Agua Caliente Tribe are unavailing. Had the Agua Caliente Tribe refused to accede to the State's demand regarding that tribe's proposed ballot initiative, and had the State then refused to negotiate a gaming compact with any tribe, Coyote Valley would be entitled to argue that the State did not act in good faith in its negotiations with Coyote Valley. However, that is not what happened. The Agua Caliente Tribe did cease its efforts regarding its proposed ballot initiative, and the State did negotiate with Coyote Valley and the other tribes. Regardless of whether the State's demands of the Agua Caliente Tribe were improper, Coyote Valley lacks standing to object to them; assuming the State's conduct is evidence of bad faith, it is evidence of bad faith in the negotiations between the State and the Agua Caliente Tribe, not the negotiations between the State and Coyote Valley.

Finally, the State cannot be held accountable for the conduct of the United States Attorney. Coyote Valley offers no evidence that the State conspired with the United States Attorney. Although Coyote Valley may believe the United States Attorney's conduct was improper, that purported impropriety cannot be imputed to the State.

IV. Substantive Issues

Coyote Valley argues that the proposed compact improperly requires tribes to make certain contributions to two State-controlled funds, and to enact a specific tribal labor relations ordinance. Coyote Valley contends that these provisions are not within the scope of allowable subject matter for gaming compacts. In the alternative, Coyote Valley argues that the positions adopted by the State on these issues demonstrate bad faith.

A. Challenged Provisions

1. Revenue Sharing Trust Fund

Coyote Valley objects to the provisions in the proposed compact that create a "Revenue Sharing Trust Fund." The Revenue Sharing Trust Fund provisions apply only to the operation of gaming devices beyond the maximum number of devices normally allowed. See Norris Dec., Ex. D (proposed compact) § 4.3.2.2. Coyote Valley does not, for the purposes of this motion, challenge the propriety of the proposed compact's limits on the number of gaming devices.[20] The compact provides that tribes that sign it may, by a certain procedure, obtain licenses to operate more than the usually allowed number of gaming devices. See Proposed Compact § 4.3.2.2(a). These licenses come from a State-wide pool of licenses, the size of which is determined by a formula that takes into account the number of tribes in the State that either are not operating any gaming devices, or are operating fewer than 350 such devices. See *id.* § 4.3.2.2(a)(1). The compact deems such tribes to be third-party beneficiaries of the compact, and the Revenue Sharing Trust Fund is used to make certain payments to these tribes. See *id.* §§ 4.3.2(a)(i) & 4.3.2.1. Although the Revenue Sharing Trust Fund is held in trust by the State, see *id.* § 4.3.2(a)(ii), the State cannot use the Revenue Sharing Trust Fund for any purpose other than to make the payments set forth in § 4.3.2.1. See *id.* § 4.3.2.1. In substance, the compact sets up a procedure by which tribes that have signed the proposed compact can license other tribes' right to operate gaming devices.

2. Special Distribution Fund

Coyote Valley also objects to the provisions in the proposed compact that create a "Special Distribution Fund." Unlike the Revenue Sharing Trust Fund payments, which are not based on the revenue generated by a tribe's gaming facilities, the Special Distribution Fund payments are

---

[20] Coyote Valley does reserve the right to challenge this limit in future negotiations with the State.

calculated as a percentage of the "average gaming device net win." See *id.* § 5.1(a). The compacts incorporate the definition of "net win" used by the American Institute of Certified Public Accountants. See *id.* § 2.15. The payments are made according to a graduated schedule, based on the total number of gaming devices in operation. See *id.* § 5.1(a). No payments are required for operation of the first 200 gaming devices. See *id.* For the next 300 gaming devices, the tribe must make a payment to the Special Distribution Fund equivalent to 7% of the average gaming device net win. For the next 500 gaming devices, a 10% payment is required, and for any additional devices, a 13% payment is required.

The Special Distribution Fund is available for appropriations by the State legislature for

> (a) grants, including any administrative costs, for programs designed to address gambling addiction; (b) grants, including any administrative costs, for the support of state and local government agencies impacted by tribal government gaming; (c) compensation for regulatory costs incurred by the State Gaming Agency and the state Department of Justice in connection with the implementation and administration of the Compact; (d) payment of shortfalls that may occur in the Revenue Sharing Trust Fund; and (e) other purposes specified by the Legislature.

Id. § 5.2. The compact states that the parties intend that tribes that have entered into compacts with the State will be consulted during the appropriation process, see *id.*, but does not expressly require such consultation.

3. Tribal Labor Relations Ordinance

Finally, Coyote Valley objects to § 10.7 of the proposed compact, which renders the compact null and void unless the tribe provides the State with

> an agreement or other procedure acceptable to the State for addressing organizational and

> representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

Id. § 10.7. According to Coyote Valley, the only such agreement or procedure that is acceptable to the State is one that is identical, in all material respects, to a Tribal Labor Relations Ordinance that was developed during compact negotiations. The State asserts that the Tribal Labor Relations Ordinance is the product of negotiations between the tribes and the unions and that the ordinance imposes only minimal obligations on tribes that enact it.

B. Allowable Subject Matter for Gaming Compacts

IGRA provides that a gaming compact may include provisions relating to

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C).

The Court reads § 2710(d)(3)(C), and specifically § 2710(d)(3)(C)(vii), more broadly than Coyote Valley does. The committee report of the Senate Select Committee on Indian Affairs describes the subparts of § 2710(d)(3)(C) as "broad areas." See S. Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084. Consistent with this description, the Court interprets "subjects that are directly related to the operation of gaming activities" to include any subject that is directly connected to the operation of gaming facilities.

Not all such subjects are included within § 2710(d)(3)(C)(vii), because that subpart is limited to subjects that are "directly" related to the operation of gaming activities. The committee report notes that Congress did "not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands." *Id.* The Court concludes that it was this concern that led Congress to limit the scope of § 2710(d)(3)(C)(vii) to subjects that are "directly" related to the operation of gaming activities. States cannot insist that compacts include provisions addressing subjects that are only indirectly related to the operation of gaming facilities.

Given the Court's interpretation of § 2710(d)(3)(C), Coyote Valley's argument that the challenged provisions of the proposed compact fall outside the scope of § 2710(d)(3)(C) lacks merit. The Revenue Sharing Trust Fund provisions are licensing provisions, and thus are authorized by § 2710(d)(3)(C)(vi). See S. Rep. No. 100-446 at 14, 1998 U.S.C.C.A.N. at 3085 (discussing the broad scope of subpart (vi)). The Revenue Sharing Trust Fund only applies if a tribe wants more gaming licenses than it otherwise would be entitled to under the proposed compact. The proposed compact provides a mechanism whereby a tribe can get more licenses by, in effect, using the licenses of tribes who have

not, for whatever reason, engaged in gaming activities. These non-gaming tribes are compensated for the use of their licenses through the Revenue Sharing Trust Fund.

Because the Revenue Sharing Trust Fund is a licensing provision, authorized under § 2710(d)(3)(C)(vi), it is not barred by § 2710(d)(4). Furthermore, the inclusion of this licensing provision in the proposed compact cannot be considered evidence of a lack of good faith on the part of the State under § 2710(d)(7)(B)(iii)(II). Not only is the Revenue Sharing Trust Fund not direct taxation of the tribe or tribal lands, it was not a "demand" of the State. See § 2710(d)(7)(B)(iii)(II). Rather, the concept of gaming tribes paying non-gaming tribes originated in Proposition 5, which was written and supported by California tribes, and was suggested to the State by the tribes during negotiations. See Norris Decl. (filed on February 4, 2000, in support of State's Opposition) at P 15.

The Special Distribution Fund is created for the purpose of covering the State's costs of overseeing gaming operations and programs addressing secondary effects of gaming operations, such as gambling addiction. Coyote Valley argues that the State may appropriate monies from the Special Distribution Fund for any purpose, because § 5.2(e) of the proposed compact allows use of such funds for "other purposes specified by the Legislature." However, the "other purposes" clause follows four other enumerated purposes for the Special Distribution Fund, each of which is directly related to gaming. Under the principle of ejusdem generis, "a general term following more specific terms means that the things embraced in the general term are of the same kind as those denoted by the specific terms." See *United States* v. *Lacy*, 119 F.3d 742, 748 (9th Cir. 1997) (quotation marks and citation omitted). The Court thus construes the "other purposes" listed in § 5.2(e) of the proposed compact to be limited to other purposes that, like the first four enumerated purposes, are directly related to gaming.

The subject matter of the Special Distribution Fund is within the scope of § 2710(d)(3)(C)(iii) (compacts may include an "assessment by the State . . . in such amounts as are necessary to defray the costs of regulating" gaming operations); see also *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 208-11, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987) (*Cabazon Band I*) (in the context of Indian law, restrictions other than those that broadly prohibit a class of conduct are "regulatory"); S. Rep. No. 100-446, at 6, 1998 U.S.C.C.A.N. at 3076 (Senate Committee expects federal courts to rely on the prohibitory/regulatory distinction discussed in *Cabazon Band I*). Accordingly, the Special Distribution Fund is not barred by § 2710(d)(4). Nor is the inclusion of this provision in the proposed compact evidence of a lack of good faith on the part of the State under § 2710(d)(7)(B)(iii)(II) because it is not a direct tax on the tribe or tribal lands.

Finally, labor relations at gaming facilities and closely related facilities, which is the subject governed by the Tribal Labor Relations Ordinance, is a subject that is "directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii).

C. Preemption and Tribal Sovereignty

Coyote Valley's final argument is that the challenged provisions of the proposed compact, even if not per se prohibited as exceeding the scope of 25 U.S.C. § 2710(d)(3)(C), impose an unreasonable burden on the tribe. According to Coyote Valley, the challenged provisions cannot be justified under the balancing test discussed by the Ninth Circuit in *Crow Tribe of Indians* v. *Montana*, 650 F.2d 1104 (9th Cir. 1981) (*Crow Tribe I*), *Crow Tribe of Indians* v. *Montana*, 819 F.2d 895 (9th Cir. 1987), aff'd, 484 U.S. 997, 98 L. Ed. 2d 638, 108 S. Ct. 685 (1988) (mem.) (*Crow Tribe II*), and *Cabazon Band of Mission Indians* v. *Wilson*, 37 F.3d 430 (9th Cir. 1994) (*Cabazon Band II*). Coyote Valley and amicus curiae Agua Caliente Band of Cahuilla Indians also

cite a recent decision by the Tenth Circuit Court of Appeals, *NLRB* v. *Pueblo of San Juan*, 228 F.3d 1195, 2000 WL 1410839, in support of their argument that a State cannot impose a labor relations ordinance on an unwilling tribe. Coyote Valley argues that the State's insistence on the challenged provisions is evidence of bad faith.

1. Tribal Sovereignty and the Balancing of Interests

In *Crow Tribe I*, the Ninth Circuit reversed the dismissal of a lawsuit brought to enjoin the application of Montana's coal mining tax to coal mining on Crow Tribe land. The court held that the Crow Tribe had "alleged facts that, if proved, would establish that the taxes are preempted [by federal law, and] infringe upon the Tribe's right to govern itself." 650 F.2d at 1107.

In *Crow Tribe II*, an appeal after a judgment in favor of the State on the merits in the same case, the court explained that a State law that interferes with tribal or federal interests will apply to on-reservation activities only if the State law is carefully tailored to support legitimate State interests that are substantial enough to justify the interference with tribal or federal interests. See 819 F.2d at 898-901. The court further held that, even if application of a State law is not barred based on a preemption analysis, the State law nonetheless cannot apply to on-reservation activities if such application would infringe tribal sovereignty. See *id.* at 902. "The principle of self-government is to seek 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.'" *Id.* (quoting *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980)).

In *Cabazon Band II*, the Ninth Circuit, after balancing the federal, tribal and State interests at stake, held that a California tax on off-track betting operations could not be applied to such operations on tribal lands, where the gaming

compact governing those operations did not expressly allow for such a tax. See 37 F.3d at 433-35.

In *Pueblo of San Juan*, the Tenth Circuit found that "the NLRA does not preempt a tribal government from the enactment and enforcement of a right-to-work tribal ordinance applicable to employees of a non-Indian company who enters into a consensual agreement with the tribe to engage in commercial activities on a reservation." 228 F.3d 1195, 1202, 2000 WL 1410839 at *8. Coyote Valley and amicus curiae argue that this holding should be read to prohibit a State from imposing its labor relations laws or requirements on a tribe.

However, even if *Pueblo of San Juan* can be read to support such a proposition, it, along with *Crow Tribe I*, *Crow Tribe II* and *Cabazon Band II*, does not support the tribe's argument. In *Crow Tribe I*, *Crow Tribe II* and *Cabazon Band II*, the State restrictions at issue were unilaterally imposed by the State, and were not authorized by federal law. In the case at bar, the State cannot unilaterally impose the challenged provisions regarding assessments and labor organization on Coyote Valley, but can only propose terms for a gaming compact that will not take effect unless Coyote Valley agrees to them. Even if Coyote Valley and the State sign a compact, it cannot take effect unless approved by the Secretary of the Interior. Although, as a matter of tribal sovereignty, the State may not be able to impose taxes or labor relations requirements on a tribe absent an agreement, that is not dispositive of whether the State lacked good faith in negotiating for or even insisting on the challenged provisions in the proposed compact, which the tribes could choose to enter into.

Because no compact can take effect without the consent of federal, tribal and State representatives, no enforceable compact can run afoul of the balancing test upon which Coyote Valley relies. Moreover, the committee report states that IGRA "is intended expressly to preempt the field in the

governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed." S. Rep. No. 100-446, at 6, 1998 U.S.C.C.A.N. at 3076. For these reasons, the Court concludes that the balancing test applicable to State attempts unilaterally to enforce restrictions on on-reservation activities does not apply to a State's proposed terms for a gaming compact.

2. Good Faith Standard

However, the substance of Coyote Valley's argument is that the challenged provisions are unreasonable. The question the Court must resolve is whether the State's negotiating position is so unreasonable that it can be said that the State has not negotiated in good faith. IGRA does not expressly define "good faith," and neither party has proposed a standard by which the Court should determine whether the State has negotiated in good faith.

The Court looks for guidance to case law interpreting the National Labor Relations Act (NLRA). Like IGRA, the NLRA imposes a duty to bargain in good faith, but does not expressly define "good faith." See 29 U.S.C. § 158(d). The Supreme Court has held that this duty "requires more than a willingness to enter upon a sterile discussion of" the parties' differences. See *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 402, 96 L. Ed. 1027, 72 S. Ct. 824 (1952). Instead, the parties must "enter into discussions with an open and fair mind and a sincere purpose to find a basis for agreement." *Seattle-First Nat'l Bank* v. *NLRB*, 638 F.2d 1221, 1227 n.9 (9th Cir. 1981) (quoting *NLRB* v. *Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972)). The Court does not intend to import federal case law interpreting the NLRA wholesale into its interpretation of the IGRA. Obviously, the relationship of employers to unions is not analogous to that of the States to tribes. However, the Court

considers the NLRA case law for guidance in interpreting a standard undefined by the IGRA.

The Court concludes that the State has negotiated with Coyote Valley in good faith. First, the State did not have to allow the tribes to engage in class III gaming at all. The Ninth Circuit has held that the State has no duty to negotiate over gaming not allowed by State law. See *Rumsey*, 64 F.3d at 1256. Class III gaming was illegal under California law until the State constitution was amended to grant compacted tribes the exclusive right to engage in it. Such gaming is still illegal in California for everyone but compacted tribes.

Second, the challenged provisions are the result of tribal-State and tribal-union negotiations, not unilateral demands by the State. The Tribal Labor Relations Ordinance is the product of negotiations between the tribes and union representatives. See Harvey Decl. (filed on February 2, 2000 in support of State's Opposition) at PP 4-5. In deference to the sovereignty concerns of several tribes, the State agreed to the tribes' request not to place the labor provisions directly in the compact. See *id.* at P 5. The Tribal Labor Relations Ordinance provides for relatively minimal organizational rights such as the right to engage in collective bargaining if the union becomes the exclusive collective bargaining representative by winning an election. See *id.* at P 6; *id.*, Exh. A. Among other provisions beneficial to the tribes, the Tribal Labor Relations Ordinance prohibits unions from interfering with a Tribal Gaming Commission's regulation of its gaming operations, allows for employment preferences for Native Americans, limits a union's right to strike, and prohibits strike-related pickets on tribal land. See *id.* at P 7; *id.*, Exh. A. As noted above, the Revenue Sharing Trust Fund had its origins in Proposition 5, which was written and supported by California tribes, and was suggested to the State by the tribes during negotiations. See Norris Decl. at P 15.

Third, in response to the State's proposed compact, Coyote Valley counter-offered with a modified compact that,

among other things, deleted the challenged provisions entirely, while retaining--and, in fact, enlarging--other aspects of the proposed compact favorable to it. See Chang Dec., Ex. I (red-lined comparison between the State's proposed compact and Coyote Valley's counter-offer). That is, Coyote Valley took the position that the compact should not address at all the subjects encompassed by the challenged provisions. As explained above, Coyote Valley's position that the challenged provisions address subjects outside the permissible scope of gaming compacts is incorrect. The State thus did not act in bad faith by refusing to accept the tribe's counter-offer.

Finally, although the State has indicated a willingness to negotiate further over the challenged provisions, see *id.*, Ex. J at 3 (Dec. 3, 1999 letter), Coyote Valley apparently has not contacted the State to arrange any further negotiations. See *id.*, Ex. K; Norris Dec. P 24. Having declined to engage in further negotiations over the challenged provisions, Coyote Valley cannot reasonably assert that the State's failure to alter those terms constitutes a refusal to negotiate in good faith.

In summary, the Court concludes that Coyote Valley has thus far chosen to limit its negotiations with the State with regard to the challenged provisions to the issue of whether the provisions are per se unreasonable, based on its position that these provisions address subjects not allowable in a gaming compact. The Court further concludes that Coyote Valley's position is incorrect. Because Coyote Valley's only counter-offer to the proposed compact is premised on this legally incorrect position, the State did not act in bad faith by refusing to accept the counter-offer. In the context of the totality of the negotiations and the resultant compact proposed by the State, the Court concludes that the State negotiated in good faith with Coyote Valley.

CONCLUSION

For the foregoing reasons, the Court DENIES Coyote Valley's motion for an order requiring the State to negotiate with Coyote Valley pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii)

and (iv) (Docket No. 51). Judgment shall enter accordingly. The Clerk shall close the file.

IT IS SO ORDERED.
Dated: JUN 15 2001

CLAUDIA WILKEN
United States District Judge

JUDGMENT - Entered on Civil Docket JUN 19 2001

This case came on for decision before the Court, the Honorable Claudia Wilken, United States District Judge, presiding, and the Court having duly rendered its decision as set forth in the Court's Order filed today,

IT IS HEREBY ORDERED AND ADJUDGED:

That judgment is entered in favor of Defendant the State of California. Each party shall bear its own costs.

Dated: JUN 15 2001

CLAUDIA WILKEN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: INDIAN GAMING RELATED CASES

CHEMEHUEVI INDIAN TRIBE; ELK VALLEY RANCHERIA; HOOPA VALLEY INDIAN TRIBE; HOPLAND BAND OF POMO INDIANS; REDDING RANCHERIA; SMITH RIVER RANCHERIA,

Plaintiffs,

and,

COYOTE VALLEY BAND OF POMO INDIANS,

Plaintiff – Appellant,

v.

THE STATE OF CALIFORNIA,

Defendant – Appellee.

No. 01-16283

D.C. No. CV-98-01806-CW

ORDER

Before: BRIGHT,* HAWKINS and W. Fletcher, Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Hawkins and W. Fletcher have voted to deny the petition for rehearing en banc; and Judge Bright so recommends.

The full court had been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed June 25, 2003, are DENIED.

---

* The Honorable Myron H. Bright, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

25 U.S.C. § 2710(d)

Class III gaming activities; authorization; revocation; Tribal-State compact.

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D) [25 USCS § 2711(e)(1)(D)].

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the

Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) (i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation

ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 5 of the Act of January 2, 1951 (64 Stat. 1135) [15 USCS § 1175] shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and (B)is in effect.

(7) (A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [tribe] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8) (A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this Act,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12 [25 USCS § 2711(b)-(d), (f)-(h)].

U.S. CONST. Art. I, § 8, cl. 3: "The Congress shall have Power. . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . ."